

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1428

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

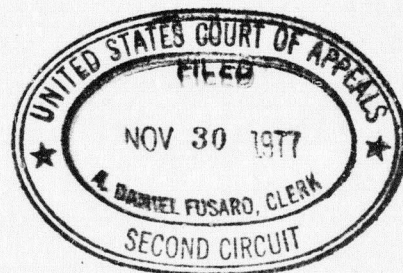
DAVID KAPLAN,

Defendant-Appellant.

*On Appeal From the United States District Court For the
Eastern District of New York.*

APPENDIX FOR APPELLANT

BELDOCK LEVINE & HOFFMAN
Attorneys for Defendant-Appellant
565 Fifth Avenue
New York, New York 10017
(212) 490-0400



PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

	Page
Docket Entries	1a
Indictment (Filed April 9, 1976)	4a
Extract From Plea Minutes (Dated June 10, 1977)	6a
Letter From Myron Beldock to Judge Costantino Dated July 21, 1977	13a
Letter From David Kaplan to Judge Cos- tantino Dated August 11, 1977	28a
Letter From Myron Beldock to Judge Costantino Dated September 14, 1977	40a
Sentencing Minutes (Dated September 23, 1977)	52a
Photocopy of Certified Disposition As a Youthful Offender	92a
Resolution of the Board of Judges of the Eastern District of New York Dated October 12, 1976	93a

DOCKET ENTRIES

(pp. 1a-3a)

1a

259

LAST FIRST MIDDLE NAME KAPLAN, DAVID

U.S. TITLE/SECTION

OFFENSES CHARGED

ORIGINAL

21-176a; 841(a)(1)

Did conspire to receive,
conceal, buy, sell quantities
of hashish & marihuana after
importing same into the USA

846(a)(1) & 846

952(a)960(a)(1) & 963

CLOSED

II KEY DATES & INTERVALS

ARREST or

INDICTMENT X

ARRAIGNMENT

SENTENCE

U.S. Custody Begins

High Risk Date

Information

4-9-76

4-21/77

9.23.77

Summons Served

Arrest Date

6/10/77

X

First Appearance

In Chambers

Petition

MAGISTRATE

Search

Issued

Warrant

Retur

Summons

Issued

Served

Arrest Warrant Issued

COMPLAINT

OFFENSE

(In Complaint)

U.S. Attorney or Asst.

ATTORNEYS

X

Myron Beldock

565-5th Avenue, NYC. 10015

490-0400

David De Petris

* Show last names and initials in entries

SHELLEY KAPLAN 2

DATE

(DOCUMENT NO.)

ADJUDICABLE DELAY

4-9-76

Before BRAMWELL, J - ~~xxxxxx~~ Indictment ordered
filed and sealed - Bench Warrant ordered/issued.

6-17-76

Affidavit of JAMES E. SIFF filed.

9/27/76

Notice of Readiness for trial filed.

1-21-77

Notice of appearance filed.

1-21-77

Bench warrant retd and filed - executed.

1-21-77

Before Bramwell, J - case called - deft & counsel Elliot
G. Sagar present - deft waives reading of indictment
and enters a plea of not guilty - 2-18-77 for motions
and case adjd to 3-23-77 for trial - bail fixed at \$100,000
surety bond.

2.1.77

Before Bramwell, J.- Case Called. Deft. & Counsel present.

Application for reduction of Bail. Motion argued and denied.

2.1.77

Affidavit of Harry King filed received from Chambers.

2-7-77

Notice of appeal filed (from denial for reduction of bail)

2-7-77

Docket entries and duplicate of Notice mailed to the
court of appeals.

✓ KAPLAN, DAVID

2a

Yr.

Docket No.

Def.

DATE	PROCEEDINGS (continued)	EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
3.18.77	Before Bramwell, J.- Case Called. Motion for Dismissal of the Indictment etc. adjd. to 3.25.77 at 10:00 A.M. on Consent.				
3.22.77	Notice of Motion for Reciprocal Discovery returnable 3.25.77 at 10:00 A.M. filed and forwarded to Chambers.				
3.22.77	Affidavit in Response and Opposition filed and forwarded to Chambers.				
3.23.77	Before Bramwell, J.- Case Called. Deft. & Counsel present. Waiver of Speedy Trial signed and witnessed. Case adjd. to 3.25.77 at 10:00 A.M.				
3.23.77	By Bramwell, J.- Waiver filed that the deft. waives in open court his rights to a speedy trial.				
3-25-77	Letter filed received from Chambers dated 3-23-77 from Elliot Sagor, Esq. re adjournment to 4-1-77. for argument on motions etc.				
3-31-77	Order filed received from the court of appeals on writ of mandamus with motion for stay etc. said petition is denied as moot. Further ordered that a stay pending determination of said petition is denied.				
4-5-77	Before Costantino J - case called - deft & counsel Elliot Sagor and Myron Beldock present - all motions by 4-23-77. Case set down for June 13, 1977 for trial				
4.21.77	Reply Affidavit of Elliot G. Sagor filed and forwarded to Chambers.				
4/26/77	Before Costantino, J-case called-motion argued to dismiss the indictment-decision reserved.JLJ				
6/10/77	Before Costantino, J-case called-deft & atty present deft having been advised of his rights by the court including the Y C a withdraws his plea of not guilty & enters a plea of guilty-sentence adjd w/o date.jlj				
6-23-77	Transcript filed dated June 10, 1977.				
6-23-77	Letter filed dated June 23, 1977 recvd from Chambers from Myron Beldock, Esq. granting permission of deft to travel to Amhurst, Mass. from June 24 thru June 26 So Ordered by Judge Costantino (see notation of Judge on bottom of letter)				
7/1/77	By Mishler, Ch J-order that deft's bail limits which are presently limited to the ED EDNY & NYC be extended to permit deft to go to Sivananda, Rural Route #D Woodburn, New York for the 4 of July weekend.jlj				
7/15/77	Before Mishler, Ch J-case called motion to extend bail limits to the State of Nevada and back to New York from 7/17/77 until 7/21/77 is granted.jlj				
7-25-77	By COSTANTINO J - Order filed that defts bail limits be extended to permit deft to go and reside in Los Angeles until July 27 1977.				

GP

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY
(Document No.)	(a) (b) (c) (d)	
9/12/77	Before Costantino, J.- case called-sentence adjd to Sept. 16, 1977...	
9/16.77	Before Costantino, J.- Case Called. Deft. & Counsel present. Sentence adjd. to 9.23.77.	
9/23.77	Before Costantino, J.- Case Called. Deft. & Counsel present. Deft is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years and a Special Parole TERM of five (5) years pursuant to Title 18, United States Code, Section 4205(b)(2).	EP
9/23.77	Judgment and Commitment filed. Certified Copies to Marshal and Probation.	EP
10-3-77	Notice of appeal filed. Docket entries and duplicate of Notice mailed to the c of a	EP
10-4-77	Judgement and commitment returned and filed - deft delivered to M.C.C., N.Y.	
10-07-77	Corrected judgment & commitment filed with the deletion of T-21:176(a) from the original judgment and commitment, tax etc. Corrected copy to MCC - deft del to MCC on 9-23-77	
10-20-77	Miscellaneous letter filed received from Chambers re defts character etc. (placed in criminal file)	
10-26-77	Sten transcript dtd 9-23-77 mg	
10-26-77	Entire file certified and handed to Mubarak Abdul-Jabbar to be transmitted to C of A. mg	
10-27-77	Scheduling order filed that the record on appeal be docketed on or before Oct. 27, 1977.	
11-4-77	Acknowledgment rec'd from C of A for receipt of file.	mg
11-18-77	Corrected copies of transcript filed of minutes taken on 9-23-77 before Judge Costantino.	

----- X

UNITED STATES OF AMERICA

-against-

DAVID KAPLAN and SHELLY KAPLAN,

Defendants.

I N D I C T M E N T

Cr.No. 76CR259
(T.21, U.S.C., §§176a,
841(a)(1), 846, 952(a),
960(a)(1) and 963)

----- X

THE GRAND JURY CHARGES:

On or about and between August 1969 and March 1974 both dates being approximate and inclusive within the Eastern District of New York and elsewhere, the defendants DAVID KAPLAN and SHELLY KAPLAN together with Irving Kaplan and Faye Kaplan herein named as co-conspirators but not as defendants and others known and unknown to the Grand Jury, did knowingly, wilfully and intentionally, combine, conspire, confederate and agree to violate prior to May 1, 1971, Section 176a of Title 21, United States Code and to violate on and after May 1, 1971, Sections 841(a)(1), 952(a) and 960(a)(1) of Title 21, United States Code.

1. It was part of said conspiracy that prior to May 1, 1971, the defendants and co-conspirators knowingly and with intent to defraud the United States would smuggle and bring into the United States quantities of marijuana and hashish, a derivative of marijuana, which should have been invoiced.

2. It was further a part of said conspiracy that prior to May 1, 1971, the defendants and co-conspirators, with intent to defraud the United States, wilfully, knowingly and unlawfully would receive, conceal, buy, sell and facilitate the transportation, concealment and sale of quantities

having been imported and brought into the United States knowing the same to have been imported and brought into the United States contrary to law.

5a

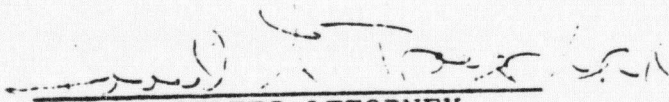
3. It was further a part of said conspiracy that on and after May 1, 1971, the defendants and co-conspirators knowingly and intentionally would import quantities of marijuana and hashish, a derivative of marijuana, a Schedule I controlled substance, into the United States from places outside thereof.

4. It was further a part of said conspiracy that on and after May 1, 1971, the defendants and co-conspirators knowingly and intentionally would distribute and possess with intent to distribute quantities of marijuana and hashish, a derivative of marijuana, a Schedule I controlled substance.

5. It was further a part of said conspiracy that the defendants and co-conspirators would conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities. (Title 21, United States Code, Sections 176a, 846 and 963.)

A TRUE BILL

Foreman


UNITED STATES ATTORNEY

EXTRACT FROM PLEA MINUTES
(Dated June 10, 1977)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

. x

UNITED STATES OF AMERICA, :

- against - :

76-CR-259

DAVID KAPLAN, :

Defendant. :

. x

United States Courthouse
Brooklyn, New York
JUNE 10, 1977

B e f o r e :

HONORABLE MARK A. COSTANTINO, U.S.D.J.

MAURICE S. DAVIS
ACTING OFFICIAL COURT REPORTER

1
2 A p p e a r a n c e s :
3
4

5 DAVID G. TRAGER, ESQ.
6 United States Attorney
for the Eastern District of New York

7 BY: RONALD DE PETRIS, ESQ.
8 Assistant U. S. Attorney
9

10 BELDOCK, LEVINE & HOFFMAN, ESQS.
11 Attorneys for Defendant
12 585 Fifth Avenue
New York, New York 10017

13 BY: ELLIOT G. SAGOR, ESQ.
14
15
16
17
18
19
20
21
22
23
24
25

* * *

1 promises as to what sentence you shall receive on the
2 day of sentencing. Do you understand that?

3 MR. KAPLAN: Yes.

4 THE COURT: I do say to you that on the day on
5 which you will be sentenced, I will listen to you and
6 I will listen to your lawyer. I will also peruse and
7 read thoroughly the probation report that will be sub-
8 mitted to the Court, and in conjunction with that, your
9 lawyer will have a right to go to the Probation Department
10 with you when they are interviewing you.

11 Your lawyer would have a right to read the entire
12 report once it is compiled and take issues with any
13 items that may be in the report which they feel may not
14 be proper or accurate under the circumstances.

15 All right. Those are the other rights you
16 have.

17 MR. KAPLAN: Yes.

18 THE COURT: Will you now tell me, in your
19 own words, what you say you have done wrong in this
20 matter?

21 MR. KAPLAN: Well, your Honor, I and several
22 other people, including my brother, Joel, we tried to
23 import marijuana out of Mexico into the United States
24 and we planned to distribute this marijuana here in this
25

1
2 country for a profit and I knew that what I was doing
3 was against the law and I knew that it was wrong.

4 THE COURT: Could you give me the approximate
5 date that this part of the conspiracy took place, be-
6 cause the indictment, just for your information, the
7 indictment reads from August '69 to March '74. We are
8 interested in May 1, 1971 up to March --

9 MR. SAGOR: I believe this was 1972 that was
10 referred to.

11 MR. KAPLAN: It was in 1972 sometime.

12 THE COURT: At the time that you first of all
13 became a member of this conspiracy, did you know it was
14 a violation of the law to become a member of a partner-
15 ship, unlawful partnership for the purpose of importing
16 a substance in violation of the statutes of the United
17 States?

18 MR. KAPLAN: Yes, I knew.

19 THE COURT: It's not the fact of the marijuana
20 that you are being charged with. It's the agreement
21 to consummate an illegal act with someone else; do you
22 understand that?

23 MR. KAPLAN: Yes.

24 THE COURT: That's what we are talking about
25 now. I will not ask you about quantity or anything else.

1
2 That's not the point.

3 Did you know that that agreement at that time
4 could, number one, have you indicted for a crime for
5 which you have been indicted? Did you know at that
6 time that you could be charged for a crime in that
7 agreement?

8 MR. KAPLAN: I didn't understand the conspiracy
9 laws at that time.

10 THE COURT: You knew at that time that it was
11 a violation of the law in some respects?

12 MR. KAPLAN: Yes.

13 THE COURT: It wasn't something hidden in your
14 mind?

15 MR. KAPLAN: Right.

16 THE COURT: Did you intend to become part of that
17 conspiracy?

18 MR. KAPLAN: Yes, I did.

19 THE COURT: Did you intend to consummate some
20 act, a part of which was agreed among yourself and
21 other co-conspirators?

22 MR. KAPLAN: Yes, I did.

23 THE COURT: Was that act to agree to import
24 in the United States and distribute in the United States,
25 for a profit, marijuana?

1
2 MR. KAPLAN: Yes, it was, your Honor.

3 THE COURT: And did you know then that that
4 agreement was unlawful?

5 MR. KAPLAN: Yes, I knew.

6 MR. DE PETRIS: Your Honor, in addition, there
7 are two substances referred to in the indictment;
8 marijuana and hashish.

9 THE COURT: Both substances?

10 MR. SAGOR: No.

11 MR. KAPLAN: No. The only substance was
12 marijuana.

13 THE COURT: In any event, that's a violation of
14 the law. Is there anything else you wish to advise
15 the Court about this conspiracy?

16 MR. KAPLAN: No, your Honor.

17 THE COURT: Just so you understand why the
18 Government made that statement just now: One of the
19 overt acts which you have been charged in the indict-
20 ment, number one reads as follows -- I will read it to
21 you in case you forgot.

22 It was further part of the said conspiracy that
23 on and after May 1, 1971, the defendants and co-con-
24 spirators knowingly and intentionally possessed with
25 intent to distribute and did possess with intent to

1
2 distribute marijuana and hashish.

3 It doesn't make the crime any worse, it's still
4 the same axiom, if that was a part of your agreement,
5 you should tell the Court it might have been.

6 MR. KAPLAN: That was not part of our agreement.

7 MR. SAGOR: I understand hashish -- I don't
8 purport to be an expert -- it's like marijuana.

9 MR. DE PETRIS: It's a derivative.

10 THE COURT: I want to make sure that he knows
11 that it's an overt act and so that he might not be making
12 a statement --

13 MR. SAGOR: He may be wrong scientifically.

14 THE COURT: I will accept that statement from
15 your lawyer.

16 Is there anything else you wish to tell me?

17 MR. KAPLAN: No, your Honor.

18 THE COURT: By the way, is there anything I have
19 said in taking your plea to this point which in anyway
20 has intimidated you to make the statements before this
21 Court?

22 MR. KAPLAN: No, there is nothing, your Honor.

23 THE COURT: Have I done anything at all to
24 coerce you to make those statements?

25 MR. KAPLAN: No, your Honor.

* * *

LETTER FROM MYRON BELDOCK TO JUDGE COSTANTINO DATED
JULY 21, 1977 (pp. 13a-27a)

13a

BELDOCK LEVINE & HOFFMAN

565 FIFTH AVENUE

NEW YORK, N. Y. 10017

ELLIOT L. HOFFMAN
LAWRENCE S. LEVINE
MYRON BELDOCK
BRUCE E. TRAUNER
ELLIOT G. SAGOR

JON B. LEVISON
KATHLEEN C. WRESIEN
DANIEL E. GILIOLI
Member Ohio & D.C. Bars Only
PETER S. MATORIN
CYNTHIA ROLLINGS

(212) 490-0400
CABLES: TELHOFFLAW, N. Y.
TELEX: 422046

VIALE MONTE SANTO, 4
20124 MILAN ITALY
Counsel.
GILBERTO GIL LI
Member Republic of Italy - Only

July 21, 1977

BY HAND

Honorable Mark A. Costantino
U.S. District Court
Eastern District of New York
Federal Building
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. David Kaplan
76 CR 259

Dear Judge Costantino:

This letter is submitted to assist the Court and probation in understanding the family and personal background of David Kaplan and to put in fair perspective the events in Mexico in the early 1970's for which he pled guilty to the marijuana importation conspiracy. The factual summaries in this letter are based on counsel's investigations, including discussions with David Kaplan, various members of his family, his employer, and various associates and friends.

David Kaplan, born 7/14/52, just turned 25 years old. He was raised in New York City, the majority of time in Bayside, Queens. He first attended Public School 169, Bay Terrace, Queens and later Bayside High School from which he graduated in 1969 at the age of 16. Between grade school and high school he attended Junior High School 149 which is located in White Stone. He skipped a year while at that Junior High.

During these years and until approximately a year after High School graduation David lived with two parents, Fay and Irving Kaplan, and his sister Debbie (3 years younger). Joel Kaplan, an older son of Irving's by a first marriage, was frequently a visitor, but did not reside with David's parents during this period of time. Joel was 12 years older than David.

David's grades in school were generally above average to good and he only failed one course -- Spanish, in High School. During junior high and high school David developed serious interests in coin collecting and swimming. He built up a substantial collection and was on the swim team during the summer at the Bay Terrace Country Club. According to his parents, David gave them absolutely no difficulty and had a "normal" childhood through high school. While in high school he delivered papers, shoveled sidewalks and baby sat in order to earn some income. Also during his high school years he worked with or through his father as a clerk in a Grand Union and in a private appetizing store, as well as a period as a clerk for a surplus merchandise and machinery business.

David's parents have an honorable and hard working background. Irving Kaplan, born June 7, 1911 (now 66 years) was born, raised, lived and worked in New York City. A graduate of Utrich High School at the age of 17, he was in the food business for 47 years, having worked up from a dairy clerk beginning 1929 (5 years in that position) to the point where he bought a Daitch store which he ran for 7 years and then sold. During World War II he worked in the Navy Yard, as an electrical welder, mostly at the Brooklyn Yard. After the war Irving progressed in the appetizing delicatessen business. He had a store in the Bronx at 183rd Street and then moved on to a store with a partner at 86th and Broadway in Manhattan. The latter business ultimately came apart, primarily because of problems with a partner, and then Irving moved into the business of packing jars of herring (Schmulka's) which also involved deliveries to various stores in the City. This business prospered and became substantial over the years; but then got to a point where, complicated by size and personality problems among the principals, Irving ultimately sold out at not very favorable terms. He continued in the grocery business. He went with Gristedes for about 6 years, then on to Daitch and then on to Waldbaums. He ultimately retired in August of 1974 at the age 63. Upon retirement Irving moved to Florida with his wife Fay. He has always suffered from the disability of having club feet and has developed an arthritic condition over the years. Neither he nor his wife Fay has ever been in trouble with the law.

Irving and Fay were married 1/19/47. Fay, a high school graduate at the age of 16, went to Hunter College at night. She worked for a long period of time in an office, starting as an assistant bookkeeper for a jewelry firm and then from 1939 to 1950 assuming greater responsibility until she became the "full charge" bookkeeper and office manager. The firm in question is Barnett Robinson located on Fifth Avenue in New York City.

Fay's only time off from work was during periods in connection with the conception and early care of her children. David was born July 14, 1952. Debra was born April 27, 1955. Fay went back to work July 1957 and from there on continued to run the office in the same firm previously mentioned until 1974 when Irving retired. While Fay was at work her mother and housekeeper would take care of the children.

Neither Fay nor Irving have worked since August of 1974. (Fay expects to go back to work soon, particularly because of expenses related to David's support and case.) They reside in Florida at 2620 N.E. First Court, Apt. 1114, Boynton Beach, Florida, 33435 in a condominium which they purchased at the time that they moved from New York City.

Both Irving and Fay have been responsible people in their communities. Before they moved to Florida they owned a condominium in Queens and both were involved in its management, Fay having been the director for a long period of time. Fay is now the treasurer and director of the condominium in Florida. Mr. Kaplan previously worked in the volunteer ambulance corps.

David Kaplan was married in July, 1971 to Shelley Edelstein, a childhood sweetheart. They had met in junior high school. They were more or less inseparable from there on. Before they were formally married they rented an apartment for about six months, which was located opposite the Fay and Irving Kaplan condominium. The marriage in July 1971 was a double wedding, along with Shelley's brother Jerry. After the marriage David and Shelley went to live at her parents' house which was also located in Bayside, Queens.

After high school graduation, David began attending Pace College (Fall of 1969), taking a business administration course with the objective of going into the business world and particularly with the idea that he could be a successful salesman. He was motivated in part by the fact that his math grades had always been high throughout school and in part by the example of his parents. However, David found that he did not have a taste for further schooling, was both bored and uninspired by the courses and teachers, and dropped out after attending only part of a semester. He did not attempt school again until a year or two later when he went to Queensboro Community College at which time he took some philosophy and other related courses. Again the school experience was hardly successful. He attended one semester and didn't complete the courses.

Up to now we have been depicting what to the probation office and the court will surely be a not unusual story of a

middle class New York youth. A crucial additive is that David was raised during a time when drugs and drug usage was the name of the game for almost all of his companions. David was not an addict. His personal use of drugs was limited to a very modest use of marijuana, occasionally in hashish form. Throughout the same period of time Shelley, his wife to be, was sharing the same experience with her companions. She too originally used drugs very infrequently in early years, but later developed more dangerous and self-destructive habits, particularly after David went to jail in Mexico and even more so after he was shot, all of which will be described in greater detail below.

In this unfortunate progression there were two people who had a seductive and perverse influence in the lives of David and Shelley. With David it was his older step-brother Joel who modelled himself after Timothy Leary in all respects; spent time apprentising with that professor of the drug occult; and who then established his own microcosm of the Leary psychedelic age, in a tent pitched right behind Leary's headquarters in Milbrook, New York. Shelley also had an older brother who inspired her as an activist in his opposition to the Vietnam war, but who also indulged heavily in drugs and introduced his sister into that world. We reiterate that David (and Shelley) did not use drugs heavily as youths and that their usage was essentially limited to marijuana. But they were both caught up in the glamour and peer pressure of the scene. And, ironically, it was through these two family relationships that David and Shelley were first introduced into the world of small accommodation transactions with friends and associates.

Like many unwitting and indulgent parents of that era, Fay and Irving Kaplan were very slow to become aware of the problems with Joel; and were largely unaware of those vis-a-vis David and Shelley. As previously indicated David and Shelley had lived largely at or adjacent to his parents' house prior to the marriage and afterwards at Shelley's parents' house. This situation existed for many years with certain gaps during which they lived in different apartments of their own. For one short stretch they moved from New York to California. This was in 1971, around the time of the marriage, to the best of David's recollection. They were then residing in a house in the mountains near San Francisco and hoped to establish their lives in that area, but unfortunately had bad experiences with several robberies which so affected them that they moved back to New York City.

The guilty plea in this case relates to charges of importation from Mexico into the United States. The first time David and Shelley became involved was after they were married.

They went down to visit David's half brother, Joel, who was living in a hut in Acapulco. Joel proposed to the newlyweds (then both approximately 18 years old) that they lend him money so he could buy some marijuana and send it back to the United States for profit. Neither David nor Shelley was a participant in Joel's importation scheme. But they lent Joel about \$500 with which he supposedly bought 25 lbs of marijuana and buried it on a beach. Neither David nor Shelley actually saw the marijuana. They went back to New York City leaving Joel in Acapulco. They understood by hearsay that afterwards he sent packages or at least intended to send packages of marijuana in small quantities to various people in the United States for his original purposes.

David went down to Mexico again, to visit with Joel, in early 1972. This was the beginning of the serious problems that are covered by this indictment. On that occasion David went down with a friend of his. They were following the suggestion that Joel had made: that they should try to arrange to obtain a large quantity of marijuana and import it into the United States. Before David went down on that occasion Joel had been up in New York City and had proposed the transaction and had also proposed that he would do a documentary film of the whole thing.

As strange as this may seem, the government has in its possession, as part of its evidence, photographs of the marijuana that was ultimately seized and that was involved in this transaction. These "still" photos are the remnants of the photography done by brother Joel which at one point included various moving pictures. Examination of the still photographs show certain letters "placed" on various collections of the marijuana -- those letters being "H O M E" and standing for Home of Mankind Eternal" which was the assumed name of brother Joel. Examination of the photographs will also show that the word "Presents" is placed under the letters "H O M E". Each "brick" was also wrapped in papers which had "H O M E" stamped on it in large letters. As may be seen, the entire transaction was largely played out as a lark, with the participants barely aware at any conscious level of the seriousness of their actions and the consequences. The marijuana in question was ultimately imported into the United States. Ironically, to complete the farcical picture, the marijuana was seized when two persons who were carrying it in Colorado were arrested. (All of the indicia of the "documentary" film, e.g., the "H O M E" lettering, were actually preserved on the evidence the government seized.)

The first of the two Mexican ventures covered by the indictment ran between approximately January 1972 and March or April of that year. The next and last Mexican venture followed almost immediately after. This time brother Joel was not involved. David had the "bug" despite the last disaster. David had spoken with some friends about the idea of importing marijuana from Mexico and decided that they would try to do it. An elaborate plan evolved, worthy of "The Gang That Couldn't Shoot Straight".

There were five young men involved. David and 3 others were all about 19 years old. One of the group got his license as a pilot. There was a plane to be involved and a proposed "drop" in the United States. The real world did not work out the same way as the glamorous plan. David and another member of the group were arrested in Torreon, Mexico before they made their connection with the Mexicans who were carrying the load of marijuana. (David could have easily escaped, but was arrested when he went back to town to try to aid his American companion who had already been taken into custody.) Their Mexican "friends" were also arrested. What happened afterwards is a typical Mexican drug arrest horror story. One of the Mexicans was severely tortured, including electric shocks to his genitals. David and his friend were roughed up. All were coerced into signing confessions. David and his friends ended up in a Mexican dungeon where they spent a very difficult period of time until the intervention of their families and family money was at least able to buy them relatively better quarters in the prison. They both served six months in this Mexican jail at tremendous daily costs to themselves and their families.* Ultimately after great efforts by all concerned and substantial monies paid to Mexican lawyers and a substantial fine they were both released. This was at the very end of 1972.

David's wife Shelley had no direct involvement in either Mexican venture. She nonetheless suffered along with the rest of the family when David was imprisoned and the marriage continued to suffer accordingly. It never actually recovered

* In the dungeon there were no toilets and they had to defecate and urinate in a hole. They lived with lice, mice and vermin. David had developed a serious case of herpes which literally did not clear up for several years. When David's mother came to visit him in the Mexican prison, at David's pleading she obtained a private doctor to assist the one Mexican companion in the venture who had had cattle prods applied to his genitals and who was so injured that he could not urinate and was highly swollen. David said he saw him swell up like a balloon before he could urinate. The doctor fortunately was able to alleviate some of the misery of this man. Even after David and his companion were moved to better quarters in the prison it was hardly any picnic and was very costly for the family who aided them by regularly sending money to the prison and to outsiders to obtain adequate food and services. (footnote continued on next page)

from the Mexican times and continually went down hill, although for a while both David and Shelley did their best, within the limits of their immaturity, to keep things going. It was some while after Mexico until David even got himself together. During that 1973 year David and Shelley set up a household outside of their mutual parents' homes and tried, with continuing lack of success as time went on, to put things together. It was a very painful period for both of them. Despite their long relationship and deep affection for each other and despite their families' support, the marriage kept coming apart at the seams. David tried to get his life on a straight keel by enrolling several courses at the New School. One course was investigative journalism. Another involved an Eastern physical and spiritual movement which requires disciplined calisthenics rituals and a type of meditation. The latter was one source of David's later more intense involvement in yoga and nutrition. David did complete those courses although he did not obtain credits. (He had not taken them for credit in the first place.) It was during this year that Shelley began to become more dependent on drugs, but she did not to David's knowledge use any hard drugs during that year. David himself was not using drugs except for the most occasional use of marijuana during this year. It was also during this 1973 year, sometime around the middle of the year, that David was involved in several marijuana transactions with one Gene Mueller. Mueller was one of the persons involved in the last Mexican venture. Mueller was several years older than David. He came from Long Island, but had been introduced to David a few years earlier in Queens. From stories about Mueller and what he would let drop, he was involved in more than marijuana and was dealing in hard drugs whenever he could and also in the sale of firearms. Mueller was very aggressive in attempting to obtain drugs and attempting to persuade others to obtain them for him. Defense counsel speculate that Mueller may at that time have been an informant for either State or Federal government. (This speculation comes from later information obtained by defense counsel.)

David's dealings with Mueller dated to mid-1973. He again surfaced in David's life in January of 1974 and almost killed David at that time. David and Shelley were staying at Shelley's parents' house in Queens. Mueller came to visit David. At that time Mueller (according to what he told David) was in a lot of trouble having to do with a drug arrest and was worried about going to jail. Mueller was acting very strangely but there

[continuation of footnote from preceding page]

Moreover, every time Mrs. Kaplan would come to visit her son she would be physically examined by matrons who put their hands under her clothes and between her legs. In other words the entire experience of 6 months in prison was, in the humble opinion of counsel, like a punishment of multiple time to both David and his family.

was no reason for David to expect that on a second visit that night by Mueller, the latter would draw a gun and shoot David point blank in the chest. Mueller fled. David was taken to the hospital in very extreme critical condition and remained so for a considerable period of time. He had total transfusions several times. His chest had filled with blood and his lung collapsed from the pressure. His lungs had to be reinflated. It is no exaggeration to say that he was near death for quite a period. (The hospital records and Doctor's report have been submitted to probation. Copies of same are separately submitted herewith. Exhibit A) After David began recovery, the canal which had been created by the bullet became infected. He ultimately had to have two major operations, one leaving him with two drainage tubes sticking out of his chest, which he had to bear for approximately one year.

Mueller was indicted for attempted murder, first degree assault and felonious possession of weapon. The case was pending for almost a year in the Queens Supreme Court (Ind. No. 547/74). The file makes it clear that a substantial portion of this time must have been due to Mueller's negotiations in trying to make a deal in exchange for making other cases. The information stated in this paragraph comes from a review of the appeal file (see explanation below, in text). On November 25, 1974, Mr. Mueller pled guilty to two class D felonies: 2d degree assault and possession of a dangerous weapon. The plea minutes, page 6, show Mueller admitting that he shot Kaplan with intent to harm him. Still Mueller was not sentenced for almost four months. On March 12, 1975 Mueller's counsel (sentence minutes, page 2) requested a further adjournment for defendant's "cooperation" with police and District Attorneys in certain drug investigations in Queens County; and also until after sentencing in Suffolk County on certain 1973 indictments for possession of narcotics. No further discussion about "cooperation" took place in open court, but the subject was presumably covered in the ensuing conference in the Judge's chambers. On return to court the Judge denied the adjournment request. But it would seem from the sentence that followed that Mueller's efforts to lighten his jail time by dint of his "cooperation" had achieved substantial success. The Judge stated that he intended to give a minimum indeterminate sentence under all the circumstances. Mueller was sentenced to an indeterminate sentence not to exceed three years, concurrent, and with credit for time served. (It should be noted that Mueller, in addition to the then pending Suffolk charges, also had a prior class D felony conviction, in 1968, for possession of a weapon.) Mueller, obviously still dissatisfied with being kept in jail, made a pro se motion to set the conviction aside (denied March 21, 1975)

and filed a Notice of Appeal. No papers were ever filed to perfect the appeal. Counsel are advised that in the end Mueller did not serve more than a year and a half total. Apparently, he was rewarded for his "cooperation." We assume that Mueller's efforts in making the case against David and Shelley Kaplan played a prominent role in that result. It is counsel's understanding that Mueller's testimony before the Grand Jury was the principal source of "evidence" that led to the indictment at bar. The alleged term of the conspiracy ended March, 1974 which was the month Mueller was indicted for his almost successful attempt to murder David Kaplan.

After David was arrested, January 21, 1977, he was detained in the Metropolitan Correctional Center for approximately one month until bail was reduced and could be raised. This was a very instructive period for David. It is as if a dam had broken in his consciousness. He began to take serious stock of his life and the disasters that have followed him. He reevaluated his actions and objectives. He began the serious study and practice of yoga and of nutrition as a science and a beneficial way of life for himself and others. The latter was not an entirely new endeavor for David. After his hospitalization and illness in 1974, in order to try to help control his infection and stop relying on medication, he had gone on a natural food diet with the assistance of various persons, including a chiropractor in Brooklyn, Dr. Stanley Bass. (Partially as a result of this, David and Shelley became involved in 1975 with Shakley Corporation distributing nutritional supplements, a modest business venture that they conducted for approximately six months.) After his release from Metropolitan Correctional Center, David was employed with Formula One Graphics which was run by Harry King, the father of a friend. He was later fortunate to find a job that combined his current interests. He had recontacted a friend, Arthur Glass, who was in the diet/nutrition business through a company known as Diet-Expo Corp. David quickly demonstrated that he has both talent and charisma in this field. He became one of the prime movers in a major Diet-Expo exhibition at the New York Coliseum which took place over four days in April 21 through 24 of 1977. The Company's credentials and David's participation have been documented by letters and papers previously submitted to probation. Copies of same are separately submitted herewith. Exhibit B. David has done extremely well with that Company and the future prospects are good. Diet-Expo has advanced plans for similar shows in New York and Los Angeles during the fall of this year and the early part of 1978. With the Court's permission, David has recently accompanied the executives of the Company to two major trade shows in Massachusetts and Nevada, successfully furthering exposure of their concepts and obtaining participants for their anticipated Diet-Expo shows. David has also been

able to put his previous company, the printing business, in contact with his new company, and discussions for the former to do the printing work for the latter are now under way. It is important to David's rehabilitation as a functioning and productive member of society that the President of Diet-Expo also overcame a felony conviction and has played both an inspirational and guiding force for David. See Exhibit B.

David's life has additionally changed most positively through his experience with Yoga which began at the Metropolitan Correctional Center. He was a regular participant in the Yoga classes at the Center which were conducted by the Sivananda Yoga Vendanta Center, Inc. located at 243 West 24th Street in New York City. When he left Metropolitan Correction Center David continued the Yoga experience in even a more serious manner, by enrolling and participating in the same Yoga Center. This institution has been regularly established for about 10 years and is highly respected. The Center has recognized David's serious disciplinary involvement with Yoga by permitting him to act, in effect, as an adjunct member of the staff. In the latter connection David has given much selfless service to the Center including regular demonstrations of Yoga, distributions of literature at street fairs, as well as at the previously mentioned Diet-Expo show and the New York Health Experience (a two day forum and public exhibition conducted over the weekend of June 7th at Hunter College); direct practical assistance in the running of the Center; and by constant efforts to proselytize the teachings, disciplines and principles among friends and acquaintances. Much of this has already been documented by letters and literature provided to Probation. Exhibit C. It is important to recognize that this Yoga Center involves an entire way of life which is rooted in the teachings of one of India's most renowned leaders, the late Swami Sivananda. Sivananda (1887-1963) was a truly remarkable man. He achieved great success in normal terms (a highly respected and affluent medical doctor). He then "gave up" all his past achievements and material goods to seek and find - after terrible poverty and suffering as a "beggar," a pilgrim and then a novitiate monk - a new life as a spiritual teacher and social activist. The Court will appreciate this summary explanation and the nature of the philosophy and "movement" to which David Kaplan has now dedicated himself by examining the inspirational biography of Swami Sivananda submitted separately herewith as Exhibit C-1.*

* This book was not submitted to probation because counsel had not yet read it and did not recognize its significance in helping to explain the Sivananda Center and David's involvement.

See also the literature concerning Swami Vishnu (Exhibit C) who is the "heir" and present leader of Sivananda movement. The writer of this letter, mindful of the injunction against counsel's injection of his personal belief about his client's credibility and character, asks the Court's permission to simply submit counsel's personal experience with Yoga exercise and discipline as supportive of its transforming beneficial effects on the mind and body. Though not within my Yogic achievement (perhaps because the attorney-litigator's life has taken too great a precedence in my hours) spiritual peace and a clear sense of inner direction are also well known benefits to those who practice Yoga in the broader and deeper sense to which David Kaplan has aspired. The leaders of the Sivananda Center have submitted letters to probation attesting to their belief that David Kaplan is well on his way to this goal. See Exhibit C-2. We emphasize the statement in the Director's letter concerning the long discussions held with David Kaplan, fully analyzing his past behavior, and the strict and positive Yogic vows which he has taken and which the experienced leadership of the Center has endorsed - by their submission to the Court that imprisonment would be unnecessary for his growth and that he has rehabilitated himself.

We also ask the Court to consider that the many "character" letters submitted on David's behalf (Exhibit D)* reflect very favorably on the credibility of the self-awareness and self-rehabilitation that has been discussed above, as well as supporting the explanations of the causes of the problems that have marked and marred David's past. In the latter respect I would urge the Court to consider most seriously the long letter from David's sister, Debra, which sensitively analyzes the source and history of the adverse effects of the relationship and marriage between David and Shelley Kaplan. We ask the Court to recognize the good sense of Debra's explanations of how David (and Shelley), when very young, were unwittingly caught up in the swell of their peer group's involvement in drugs as a glamorous/rebellious way of life. (The indictment reaches back to 1969, when they were only 17 years old.)

Early in this letter we reviewed the Kaplan marriage up to the point when David was imprisoned in Mexico the last six months of 1972. It was only a year after his

* Copies have either previously been submitted to probation or are concurrently being submitted.

release that David was shot by Mueller. The Mexican imprisonment had disrupted the marriage and had been terribly upsetting. But it was not until after David was shot that Shelley, obviously breaking down under enormous strain of years of misfortune in the marriage, began using "hard" drugs, particularly heroin and cocaine.* Her psychological deterioration was accompanied by an involvement with another man which began about a year before her arrest in April 1976. These circumstances - referred to for example in Debra Kaplan's letter (see Exhibit D) - caused David enormous pain and saw him confused about life and his objectives through much that period, beginning late in 1975. For some months after Shelley's other relationship had begun, she and David tried to put their marriage back together, living in Florida in a house rented by and located near David's parents. It didn't work and probably, in the long run, this will be for the good and allow both persons to productively repair their lives. We commend to the Court the comments in that respect in the Debra Kaplan letter and her insights about the mutually destructive character of the relationship. Certainly its termination has released energies and clarified perspectives, enabling David Kaplan to find himself and to consistently act constructively for the first time in many years.

* * * *

We respectfully submit to the court that Young Adult Offender and probation would be a fair and just sentence, properly serving the interests of the government and the defendant.

There are many positive factors and favorable changes in circumstances upon which the Court can rely. The destructive marriage is over. There is a solid job with a fine future, in a field particularly suitable to David's talents and background. There is exceptionally strong support from family, friends and business associates. In that regard, it is significant (as the many character letters show) that David has spoken openly to others about his past and has essentially committed himself and all of

* As previously indicated David's illness and course of recovery were prolonged through 1974 and into 1975. His last hospital visit was late February 1975 when the bullet was removed. (See Exhibit A) but he remained under medical treatment (including the prescribed nutritional regimes previously mentioned) for several years.

the
his relationships to/promise that the rehabilitated David Kaplan is the person they can count on. There is, additionally and of great importance, David's dedicated involvement in the Sivananda Center and the Yoga disciplines, philosophy and way of life. Thus a meaningful personal and social purpose and a community with others similarly engaged has filled the void that was so glaring in David's past.

We believe that the report of Pre-Trial Services (Mr. Campbell), which has supervised David continuously since his release on bail in mid-February, will fully support David's growth and the credible track record that he has established over these five months. We know that some might take the attitude that he wasn't working before and that all these accomplishments are only because of the threat of his case and possible imprisonment. We submit that such an attitude would be completely wrong-headed. It would obtusely fail to consider the events which we have reviewed in this memorandum which fairly explain David's past actions and why, once there was a "break," he has been truly receptive to positive change. Moreover, it is no detriment to David's sentence plea that his arrest and detention acted as a catalyst. Such effect is exactly what the judicial system hopes for. It enables the Court to conclude from David's recent and current track record that he has benefited from supervision of Pre-Trial Services and from concern with the adverse consequences of his past actions. It enables the Court to conclude that he "will benefit from the treatment provided under the Federal Youth Corrections Act" (See 18 U.S.C. Sect. 4216) and from the guidance of probation. Under all the circumstances reviewed in this memorandum and in view of the fact that David is a first offender, there is more than sufficient basis to conclude that David will strive to earn the certificate setting aside the conviction and will not jeopardize his life or damage the faith others have put in him by any acts that might subject him to imprisonment under the six year term.*

* We recognize the theoretical problem created by the fact that on a different and later marijuana offense pending in this District, Shelley Kaplan was sentenced by Judge Bramwell, after 60 day commitment for study, to serve three years. We submit that David should be judged separately from Shelley and should not have his sentence considerations prejudiced by the disposition in or any aspect of Shelley's [Footnote continued on next page]

There also are several issues of comparative justice which we submit should be weighed in David Kaplan's favor. First, since this is a marijuana importation conspiracy the public "need" for exemplary punishment which frequently plays a significant part in prison sentences for heroin, cocaine, opium, etc., simply does not exist. This distinction should be greatly reinforced by the many studies, reports, legislative investigations, commissions, etc., which have favored decriminalization or legalization of marijuana. Under the circumstances at bar, a prison term and deprivation of the opportunity of Young Adult Offender status, would be a sorry throwback, ignoring the advanced state of the responsible thinking throughout most of the country. Also, we submit the offense and disposition statistics, 1975 and 1976, for the Eastern and Southern Districts of New York and for the District of Columbia, which

[Footnote continued from previous page] case or the probation file in her case. Moreover, there are many differences for which David should be given the benefit and credit. Shelley was a second offender, with a previous New Jersey felony narcotics conviction and had therefore been given the proverbial one bite of the apple when she was placed on probation. Shelley did not serve time for the same federal offense, as David has. She was released on bail at or very shortly after arraignment in New York and, of course, did not serve time in Mexico. Shelley did not have the very positive track record of current rehabilitation which David has established. Shelley did not have the substantial support of family, friends and business associates, which David has. Shelley was obviously in serious psychological difficulty - notably her involvement with heroin and cocaine - so that the court may have concluded that a structured supervised environment would be necessary and beneficial. We also think that her presentation to the Court, in blaming all her troubles on David and in painting him as her Svengali, was not only transparently unfair and inaccurate, but reflected a real failure to candidly face her problems and their causes. We respectfully suggest that a balanced and fair presentation would have better served her and the Court and might well have resulted in a more lenient sentence.

show that many defendants - a majority if the three Districts are combined - receive probation for marijuana charges. See Exhibit E.

Second, it would be literally shocking as a comparative matter were David, who has already served seven months (six in Mexico, and one in the Metropolitan Correctional Center), to go to jail when Mueller has only served a year and a half despite his attempt to murder David, his various other narcotics arrests, his involvement as one of the conspirators in the case at bar and who knows what else.

Finally, the sentence proposed by counsel is fair and just because David (and his family) have already been punished severely by the Mexican imprisonment for essentially the same actions to which he has pled guilty in this case. It is common knowledge, of which the Court may take judicial notice, that it is not the usual practice of our Government to rearrest and reindict United States citizens who have served time in foreign prisons for conspiracies to import narcotics into this country. Moreover, equitable application of the doctrine of Petite v. United States, 361 U.S. 529 (1960) [barring successive federal prosecution after there has been previous state prosecution], compels that David Kaplan not be again sent to prison for the same conspiracy for which he served such hard time in Mexico.

Respectfully submitted,

BELDOCK, LEVINE & HOFFMAN

By



Myron Beldock

MB:lt

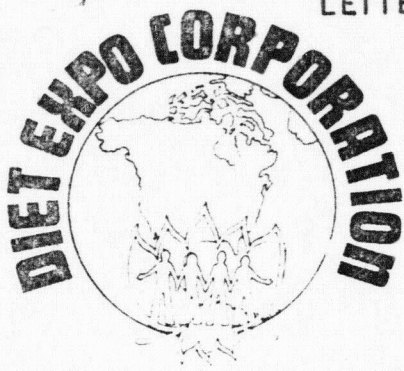
cc: Mr. Frederik P. Schramm
Probation Officer

P.S. Two additional copies of this sentence memorandum and exhibits (with several stated exceptions where materials are too voluminous for reproduction) are submitted herewith for consideration by the other members of the sentencing panel.

LETTER FROM DAVID KAPLAN TO JUDGE COSTANTINO DATED
AUGUST 11, 1977 (pp. 28a-39a)

28a

Diet & Nutrition Shows for the Trade & Public



August 11, 1977

Honorable Mark A. Costantino
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York

Dear Judge Costantino:

I am writing this letter to convey to you some understanding of me. I had not expected to write to the court. I thought that the letters of my friends, family, employer and lawyer would be sufficient. I am writing because I read the Probation Department's pre-sentence report, and I can see that the probation officer does not consider my efforts at rehabilitation to be real. I don't think the report reflects a fair judgement of me. I think it reflects the generalized attitude that persons who have been involved in anti-social activities over a long period of time are incapable of sincere rehabilitation. I can understand that the probation officer in the very short time we spent together (really no more than an hour or so in his office and literally minutes at a house visit) saw and heard only superficially who I am. I have asked the probation officer and will ask him again, through my counsel, to take a further opportunity to see what I am really like by spending a day or at least a substantial proportion of a day accompanying me. I believe that upon seeing me in my present life, the probation office will understand that I have gone through real, productive changes. What I want to do in this letter is try to relate to the court

OUR GOAL — A HEALTHY AMERICA

Honorable Mark A. Costantino

- 2 -

August 11, 1977

how I see that the changes came about and what I feel about my life.

I want to first spend a little time talking about my past. The probation report paints an unattractive picture of me. I, too, have little respect for my past and affirm that I have been materialistic and have not had sufficient respect for the law. My past actions were swayed by impulses, selfishness and greed. I was hurting myself and I have had to pay dearly for what I have done and will be a long time making amends. But I have not been a vicious person. I have been misguided and on the wrong track of life for a long time. I was also very young and very immature. But I have been loyal to my friends, generous to a fault, and decent in my dealings with other people. There has been a great desire in me to do good which has been repressed by my confused behavior and attitude. I tried very hard in my marriage and suffered greatly because of my inability to understand myself and my wife and how we were mutually self-destructive. In order to better understand this, I can only ask the court to examine carefully the letters submitted by family and friends which have been written in my behalf.

The section of the probation report labeled "Defendant's Statement" is fairly accurate as far as it goes. I do "blame" my half-brother Joel for leading me astray and I do believe that the drug culture which existed all around me in my youth had an overwhelmingly seductive power which I, in my immaturity, was unable to resist. I explained to the probation officer that in the society in which I was growing up it seemed to me to be a choice of either drinking or smoking pot because all of my friends were doing either one or the other. Drinking did not appeal to me because it seemed to lead to rowdiness and violence and stupid actions. Marijuana

seemed the lesser of the two evils, as it seemed to make people more congenial. Now I realize all drugs intoxicate the body and break down our natural defenses. Drugs only relieve the symptoms, they do not cure diseases.

As for my half-brother Joel's influence, I see from the probation report that there is scepticism. In blaming Joel I do not mean that I am blameless. I accept the burden of my wrong actions. I am only trying to explain how it happened. I ask the court to understand the impact of the fact that I was around a big brother who was very influential in my life and heavily into drugs. Joel lived not in Queens, but in Greenwich Village. He lived a bohemian life which to me represented excitement and glamour. If I met him now I would literally run from him. But I used to hang out with him as much as I could. Joel had a tremendous influence on my mind and my behavior. He was my first introduction to the drug world, not only on the small personal scale I have indicated, but in my initial efforts to obtain and sell marijuana (between 1967 and 1970). It was through Joel that I met other people in the drug world. Joel is how it all got started and how I got to Mexico.

I would have to admit that my present life as a productive person is relatively very recent. It does have some roots in the past, however, and in looking back I am amazed at how obtuse I have been in failing to follow through on past lessons. My past has not been as glamorous and exciting as the report makes it sound. Being in prison in Mexico was a horrible experience. Being shot and nearly dying is almost too difficult to explain. When I was shot I thought it was the end, then suddenly I saw a flash and all my previous actions passed

Honorable Mark A. Costantiono

- 4 -

August 11, 1977

before my eyes. I believe that at that moment the seed was planted which would change my way of life despite the fact that in my confused state I did not analyze or act upon a fairly significant change in my feelings. Perhaps part of the reason for my failure to begin to act constructively at that point was the trauma of being shot and injured. But most importantly, I simply wasn't ready to learn without much more pain and suffering.

More suffering followed. After I was in the hospital for two weeks the doctors noticed that the canal that the bullet caused had become infected. The antibiotics they gave me made the infection worse, causing it to spread through my chest. They then had to cut out a piece of my rib and insert two drainage tubes which hung out of my back draining the infection every day for over ten months.

After the operation and another month in the hospital, I consulted a doctor of chiropractic and nutrition. I felt that the drugs were just causing complications and were not healing the disease. I stopped taking the prescribed medicines and started eating only natural foods. I actually started quickly to get better. This healing and the feeling of well-being that came with it inspired me to study nutrition. I also began to try to make a living. My initial efforts involved a distributorship which my wife Shelly and I set up for the Shaklee Company in 1975. We distributed nutritional supplements and vitamins for about six to eight months. It turned out to be pretty much a break-even venture, but the experience I had then, which included studying the subject matter of health and health foods and also contacts with some people in the

Honorable Mark A. Costantino

- 5 -

August 11, 1977

field, have helped me since I became involved with the Diet Expo Corp. after my release from prison on bail.

The one month I spent at the Metropolitan Correction Center earlier this year was probably the real turning point for me. I don't mean the loss of liberty and restrictions of the jail experience. These were significant and meaningful but in themselves would not have made me change. As I reflect on my past and consider the fact that the experience of being six months in a Mexican prison and of suffering for over a year from having been shot and almost killed, did not cause sufficient changes in me, it would seem that I needed a bomb of titanic proportions to open my mind. That bomb actually came when I learned from my lawyers that I had been betrayed by my own wife in such a way as to practically eliminate any chance of my being reviewed fairly by the court, the United States attorney's office, or probation. I could not and did not want to believe this. The psychological pain was greater than anything I have ever experienced.

In keeping with Shelly's statements to the court and to probation, my probation report seems to look on my marriage as having existed solely for the purpose of a partnership in the drug trade. That is completely unfair and inaccurate. Shelly and I were deeply in love for years and cared for each other very much. Only now do I recognize how incompatible we were and how bad we were for each other. The false excitement of the drug world literally acted as a shield against our facing our real problems. We alternated between states of hysteria and depression. There is a section of the probation report which describes my relationship with

Honorable Mark A. Costantino

- 6 -

August 11, 1977

Shelly and my explanation as to why it changed. The statement there is not really accurate since it is incomplete and without more it is misleading. I did say that Shelly was at first a dedicated and devoted wife and suffered a great deal because of me, although as to her suffering I was referring to my Mexican imprisonment and my having been shot and hospitalized. But I thought I had explained to the probation officer that I saw the major cause of the gradual break-up of our marriage to have come from Shelly's increasing hard drug usage, her dependence on drugs and her related lack of discipline in going along with her friends, who were very oriented towards drug usage on a regular basis. In the last year or so, before Shelly was arrested, when we went back and forth in our relationship, Shelly was involved with another man and they were both into hard drugs together. This situation kept me in a state of constant anxiety and in a sense prevented any progress in my own self-development. Please understand that I am not saying that I would have suddenly seen the light and gotten a job if Shelly and I had been happy together. All I am saying is that the circumstances were so emotionally difficult that I couldn't even begin to rethink my life.

The bombshell and the opportunity to think about it actually occurred at the Metropolitan Correction Center when I realized that Shelly, after all this, had betrayed me so miserably. I felt like I was dying during the first week in prison. I realized the waste of my life and of Shelly's and the meaninglessness of all the suffering we had been through and had put others through. What would have happened to me and how I would have reacted had I gone on with no help I cannot say. Fortunately for me, something happened which has caused me to be

Honorable Mark A. Costantino

- 7 -

August 11, 1977

able to deal with my past and to begin to build a different kind of life for the future. What happened is that I was introduced to yoga. I wish the court had experienced yoga and had an understanding of what it is, because I think this might sound laughable if the court is unacquainted with it. Because an understanding of it is important to an understanding of what happened to me, I will say briefly that yoga brings true peace and contentment. It awakens a higher sense of well-being and inner energy necessary for following a highly disciplined way of life. Yoga massages the internal organs, purifying and strengthening them. It builds us endurance, will-power and concentration. The yoga teaching has given me a pivot to revolve around and an infinite source of inspiration.

I met my first yoga teacher while I was in jail. He visited MCC once a week to give a lecture to the inmates. His inner peace, selfless service and devotion inspired me very much. I started practicing yoga three to four hours daily and taking the class once a week. Through study I began to realize the experience of being in touch with my true self. Through introspection and self-analysis and mental anguish I awoke a higher consciousness in myself. Yoga is a way of life for life; it is the complete science of body and mind. It will always be the foundation of my life.

I know that may have sounded a little far out for the probation department. The report seems to reject my dedication to yoga as if it were some superficial cloak I had put on to avoid punishment. But the fact is that my experience in yoga started at the Metropolitan Correction Center in January-February 1977 and that immediately after release, I became involved with the Sivananda Center. My attorneys and I did not

Honorable Mark A. Costantino

- 8 -

August 11, 1977

reach the point of seriously considering a plea until the first discussions in that regard were held with the United States attorney's office in late May. I also recognize from some of the comments in the probation report that there is simply a lack of understanding on the part of probation as to what I have been involved in and what the yoga philosophy, as a way of life, really means.

Yoga is not a facade I am trying to hide behind. At this point I really feel a deep devotion to yogic teachings. Over the last six months or so I have realized that the last decade of my life was built on fantasies and delusions of grandeur and nothing more than that. My life used to revolve around my ego and making money and seeking recognition. Yoga has opened the way for me to change my life. It has motivated me to re-evaluate my values and previous actions. I am spending a lot of time studying Karmic Yoga, especially a book written by Swami Sivananda entitled Practice of Karma Yoga. "Karma" means work or action. The law of action has to do with the law of cause and effect, action and reaction. Because of the law of retribution, I will try never to do any wrong actions. I know they will react upon me and bring misery and pain. A true Karma Yogi takes delight in serving others. He finds joy in doing good for others. A true Karma Yogi finds inner inspiration, strength and power by performing motiveless and selfless actions. Swami Sivananda writes: "Serve. Love. Give. Purify. Meditate. Realize. Be good. Do good. Be kind. Be compassionate. Inquire who am 'I'. Know the self and be free." Yoga has at its heart the concept of redemption and dedication to knowing oneself and to doing good work. I am not ashamed of the fact that I have only recently come to this state of being. I have a long way to do before achieving karma yoga, but I hope to get there.

Honorable Mark A. Costantino

- 9 -

August 11, 1977

My life now centers around my yoga practices and people I have met through Diet Expo, both within the company itself and in other companies I am in contact with.

The probation report takes the approach that because I had a criminal past I could not possibly have sincerely changed and rehabilitated myself. I have asked the probation officer to visit me at the yoga center and to talk to the people there and to observe me in action. I think that because of his busy schedule he was unable to do so. Now that sentencing has been postponed until September 16th, my counsel tells me he will repeat this request in writing so that probation can see that my involvement in yoga is real and positive and productive.

I had also asked the probation officer to visit me on the job at Diet Expo but he was unable to do so. My counsel will request probation to find an opportunity to do this prior to September 16th because the report seems to treat my job situation as being another cunning put on of some sort. The fact is that the job is an ideal situation for me. It has given me, for the first time, an opportunity to put together my various talents and desires in a constructive way. I love this job and live it with a sense that I can do good work and be successful. (The probation report seems to fault me for having found certain of my college courses to be boring and for having found my first job after release from the Metropolitan Correction Center to have been essentially non-inspiring. I think rather that I have been frank in those explanations just as I am being truthful re the inspiration of my job at Diet Expo.)

The purpose of Diet Expo is to promote health, health of the body, mind and spirit and preventive medicine (using herbs, physical fitness, natural foods, breathing exercises, relaxation and sunshine). The company

Honorable Mark A. Costantino

- 10 -

August 11, 1977

motivates people to take responsibility for their health by creating an exciting educational atmosphere of lectures and debates. We make it possible for people to participate in healthful activities such as physical exercise, consciousness-raising and nutritious diets. At our shows the public can be informed of new natural and dietetic foods, vitamins, herbs, health aids and mind-training organizations. We are trying to get people more spiritually aware of themselves so a better foundation for brotherhood and cooperation can be found. The court knows that we held a major show at the Coliseum in New York last spring which 28,000 people attended, and that there are shows planned for Madison Square Garden in New York and Los Angeles Sports Arena. We have just been successful in obtaining a permit for a mini Diet Expo show at Washington Square Park which will be held on the weekend of September 17th and 18th. I think the company's executive team is solid and that we have a bright future and a lot of opportunity to do good. Our major problem is that we are a young company with very limited funding and have to raise substantial funds for each of the major events that are planned. The show in New York last April was very successful from every point of view except financial, which was to be expected in a relatively new field and new venture. However, the loss was not too great and the company managed to stay intact and our investors and our creditors have been willing to move forward with us. The company is planning to rent a cable TV channel and is looking forward to holding a combined spiritual concern and health lecture. I feel I am perfectly suited for the work I am now involved in. I can prove to people how a change in diet saved me from serious illness and relate it to how they can feel better by doing the same. I can teach people in yoga phil-

osophy and postures. In fact, I have become involved teaching yoga and nutrition to young people in one of the Project Return Rehabilitation Centers.

Going back to Diet Expo, I can use my mind and experience in dealing with companies and unions, and I can use my creative ideas for public relations and advertising promotion. I want to utilize my new energy in bringing maximum good to a great number of people. I feel Diet Expo will be a vehicle for expanding people's consciousness and for health here in America. I feel involved in a strong cause.

I really feel that I have corrected my foolish actions and that I am now supported by a new constructive life in service to others. At the same time that I am promoting health I will be spreading the universal laws of Karma yoga. I will try to do virtuous acts, as they will bring joy, peace and strength to all.

I am not an apologist for my past. I am an advocate in this letter for my present. I want the court to believe that the David Kaplan which has been presented in my lawyer's letter and through the writings of my friends and associates is real and that the change that they see in me is the real thing and can be counted on by the court. I have been overwhelmed by the pain and worry my family has experienced and is still experiencing. I have thought again and again with great pain about the terrible degenerative state of mind my wife manifested through destructive use of drugs. I clearly see what drugs did to my wife. I truly regret that I ever had anything to do with drugs. Through the help of my friends and my yoga teachers, and through my finally having come to terms with myself, I feel as if I have found my way out of a dark cave. Whatever happens when I am sentenced, I will not turn back in that wrong direction. I pray that the court gives me an opportunity to continue my path. I hope that the court in sentencing me will accept the honesty of my reha-

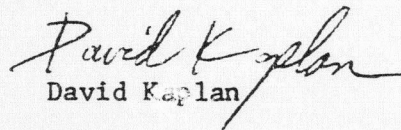
Honorable Mark A. Costantino

- 12 -

August 11, 1977

bilitation rather than the one-sided and distorted picture which one gets from the probation report of a person incapable of progressive change. In the short space of time that I met with probation I apparently failed in exposing enough of myself and in conveying enough of myself and in conveying enough of my current experiences for the probation office to make a fair judgment of me. I have attempted in this letter and in other materials that have been submitted by my counsel to rectify that picture. I greatly appreciate this opportunity to speak my mind and clear my soul before the court.

Respectfully yours,


David Kaplan

cc: Frederic P. Schramm, Probation Dept.

LETTER FROM MYRON BELDOCK TO JUDGE COSTANTINO DATED
SEPTEMBER 14, 1977 (pp. 40a-51a)
BELDOCK LEVINE & HOFFMAN

40a

565 FIFTH AVENUE

NEW YORK, N. Y. 10017

ELLIOT L. HOFFMAN
LAWRENCE S. LEVINE
MYRON BELDOCK
BRUCE E. TRAUNER
ELLIOT G. SAGOR

JON B. LEVISON
KATHLEEN C. WRESIEN
DANIEL E. GILIOLI
Member Ohio & D.C. Bars Only
PETER S. MATORIN
CYNTHIA ROLLINGS

(212) 490-0400
CABLES: TELHOFFLAW, N.Y.
TELEX: 422048

VIALE MONTE SANTO, 4
20124 MILAN ITALY
Counsel:
GILBERTO GILIOLI
Member Republic of Italy Bar Only

September 14, 1977

BY HAND

Hon. Mark A. Costantino
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. David Kaplan
76 CR 259

Dear Judge Costantino:

This letter is submitted in connection with the sentencing of David Kaplan, in order to raise certain claims of error and exceptions to the Probation Department's presentence report.

Our first objection to the report is general. It goes to the basic question of the report's adequacy, accuracy and fairness. This report should be a document designed to knowledgeably assist the court in reaching an appropriate sentence based on complete and balanced information. It reads rather as a tract for the unacceptable notion that once a man has established a history of wrong-doing, his expressions of remorse and his efforts at rehabilitation and accomplishments must be prejudged as false and unworthy. Thus, for example, the Probation report practically disregards anything that David Kaplan has done in turning his life around; all of his accomplishments with Diet Expo; all of his explanations about the origins and reasons for his past behavior; the suffering he and his family underwent during his imprisonment in Mexico and as a result of his having been shot by Gene Mueller; and literally all of the positive and redemptive facts, strongly supported by character letters and other materials, which have been put before Probation and the court to show that the David Kaplan now awaiting sentence is a man worthy of being given leniency and a chance to continue his now solid, productive behavior.

Hon. Mark A. Costantino

-2-

September 14, 1977

To the extent the Probation report does not disregard these various positive and explanatory factors, it consistently denigrates them, glosses them over or undercuts them for no apparent reason except the general attitude that Mr. Kaplan's good works must be disregarded because of his past and that he must be punished regardless of the fact that he has proven he is a rehabilitated person. Thus the report refers a number of times to his having been a "fugitive" and to having been vague about his whereabouts during the period prior to his arrest. These references recur although in the Probation Officer's presence I advised Mr. Kaplan that he was to answer responsively to questions concerning the period covered by the indictment, but not as to the period pre-arrest and subsequent to the conspiracy to which he had pled guilty. This explanation and ground rule was apparently accepted by the Probation Officer at the time.

Also, we object to the report's critical comment as to Mr. Kaplan's alleged statement that he did not have knowledge of the indictment during the time he was at liberty following his wife's arrest on April 15, 1976 and until his arrest in January of 1977. In that regard there must have been some misunderstanding by the Probation Officer of what Mr. Kaplan actually said or by Mr. Kaplan regarding the thrust of the inquiry. (Mr. Kaplan may also have been vague in his response because of the instructions and ground rule I have just mentioned.) There is no question that at some point in time he gained knowledge of the indictment although initially he was not in New York and did not have such knowledge.

We object to the Probation report because of its consistent reliance on hearsay allegations concerning incidents other than the matter for which Mr. Kaplan pled guilty - the marijuana importation and distribution conspiracy which was terminated in early 1974.

In emphasizing rumor and suspicion concerning other uncharged violations, the report fails to give proper emphasis to the factual history of the one offense before this Court. As to this crime, Mr. Kaplan served time in a Mexican jail, a term that would ordinarily by all civilized standards be considered more than sufficient punishment for his past actions. The Probation report gives no credit to this fact. My letter to the Court dated July 21, 1977 contains more details concerning that imprisonment. The Court should be advised, however, that in response to a request under the Freedom of Information Act defendant's counsel recently received certain documents from the United States Department of Justice, Drug Enforcement Administration, which include various reports concerning Mr. Kaplan's arrest and imprisonment in Mexico. Copies of several pertinent pages of these documents are attached

Hon. Mark A. Costantino

-3-

September 14, 1977

hereto. Two facts must be noted: (1) that United States government agents, according to the reports, were directly involved in the arrest of David Kaplan and his codefendant in that matter; and (2) that the latest report in that series, dated August 14, 1973, after Mr. Kaplan's Mexican imprisonment and release, concludes: "Based on the above and the fact that there is no current investigation on this case, [omitted material blanked out] is being closed by the MDO". The latter determination took place even though other government reports showed awareness of Mr. Kaplan's involvement in certain other past activities during the course of the alleged conspiracy. Thus, the government was originally aware of, actually involved in the arrest of Mr. Kaplan for the Mexican matter; and closed its files and its investigation regarding Mr. Kaplan's past activities after he was released from incarceration in Mexico. Under these circumstances, counsel respectfully submits to the Court that by any fair analysis the only period of time that should be seriously considered for sentencing purposes in this case is the short period between August 1973 and early January 1974 when Mr. Kaplan was shot and almost killed by Gene Mueller. Regarding that period, the Probation report contains only the statement: "[After March 1973] according to federal authorities, defendant resumed his involvement in distribution of various drugs. In December 1973, informants advised DEA that defendant and his wife were local distributors of methamphetamine (speed) which the Kaplans are believed to have obtained from a pharmaceutical firm during a trip to Canada." In addition to objecting to the insertion of such a prejudicial statement so obviously resting on hearsay, the latter allegations are specifically challenged as false.

We also object to the fact that there are several references in the report to the allegations that Mr. and Mrs. Kaplan, parents of David, were involved in the conspiracy; and to the fact that this implication (which almost surely results solely from Gene Mueller's fabrications) is used to undercut positive attributes of both Mr. Kaplan and his family.

Counsel specifically objects to the claim that Mr. Kaplan was convicted of a crime in connection with an original charge of possession of a forged instrument second degree in Queens Criminal Court on December 16, 1970. The Probation report indicates that this case resulted in a "conditional discharge" on February 9, 1971. Mr. Kaplan not only did not recollect this matter when talking to the Probation department, but, in subsequent discussions with counsel, had the recollection that the case did not involve a criminal conviction. His present recollection is that he was told by his lawyer then that there would be no permanent record in connection with that matter; and that his "record" would be given back to him. In this respect, the Probation Department may have

Hon. Mark A. Costantino

-4-

September 14, 1977

better information than I have been able to obtain. However, I spoke to Stanley Siegel of the law firm of Herman Graber and Stanley Siegel who represented Mr. Kaplan in the matter. I asked Mr. Siegel to attempt to locate the file to find out what had happened. He did so. He told me that his office only maintains files for felonies and misdemeanors. His office has files for the period of time in question. It does not have a file on David Kaplan. He therefore assumed that the case had resulted in a violation, for which his office would not continue to maintain a file. Under Penal Law §65.05 (New York State) a conditional discharge is an appropriate sentence for a violation. I have no further information concerning this matter, but I question its categorization by the Probation Department as a previous conviction of a crime and ask the Probation Department to advise the Court of all the information it has or can obtain in this regard. (It is also possible, obviously, that the case ended with youthful offender treatment. The latter would fit what Mr. Kaplan remembers being told concerning no record of conviction.) I stress this matter because Probation takes pains to utilize it as a prior criminal conviction (although its description of how it obtained the information, by police telephone check, is at least questionable as to its reliability). In addition, I find it difficult to believe, as an experienced criminal counsel, that a matter of such nature, involving an 18-year old who had no previous criminal record, would be resolved so negatively to the defendant, especially since his present recollection is that there was to be no record.

We specifically object to the speculative and hearsay basis of much of the negative information in the Probation report, both as to Mr. Kaplan's alleged activity many years ago and in the years subsequent to the alleged conspiracy. These speculative and hearsay matters are improperly brought before the Court and should not be given any consideration. It puts an enormous and unfair burden on Mr. Kaplan to have to face and refute them in view of the specific plea which he entered on the conspiracy for importation of marijuana. It would seem that the speculative and hearsay information comes primarily from informers and particularly from persons whose interest is to cast principal blame on others in order to avoid their own punishments in matters for which they themselves have been apprehended. This type of information is notoriously unreliable and notoriously exaggerated.

Probation's emphasis on these hearsay and speculative "matters" is typical of its misdirected attempt to undercut Mr. Kaplan's efforts to prove to this Court that he is now a rehabilitated person who has completely turned his back on any involvement with drugs and has made himself a productive and sound citizen.

Hon. Mark A. Costantino

-5-

September 14, 1977

For the same reasons we specifically object to the several references in the Probation report concerning charges in Arizona for which Mr. Kaplan was tried and which were dismissed in 1973. Probation uses those charges to attempt to further bury Mr. Kaplan's current achievements and potential. This is unfair both because of the resolution of that case and because of the current posture of the defendant before this Court.

We specifically object to the several references in the Probation report to information contained in the earlier Probation report of defendant's wife, Shelly Kaplan. We contend that all such references are improper, should not have been brought before this Court and can only tend unfairly to prejudice the defendant, as Mrs. Kaplan apparently found it advisable to distort her past relationship with her husband in order to seek sympathy from the Court by throwing blame on him.

We specifically object to the Probation Department's report in that it utilizes candid statements by the defendant to attempt to prejudice him in the Court's eyes. For example, Mr. Kaplan reported to Probation that he had a recollection that his sister had been involved in some matter with the police. Probation, without speaking to Debra Kaplan, chose to use this information to suggest that she lied in her letter to the Court when she said that she had not previously been in trouble with the law. Her statement was in fact accurate since what David recollected referred to an event when she was fifteen years old and stopped in a vehicle driven by a 21 year old friend. At that time two marijuana cigarettes were found in the car. No charges were filed against her. If this event was in fact significant to Probation, Debra was easily accessible in New York for a full explanation. Rather than seeking a clarification, Probation chose to use her brother's candid and hazy recollection to try to blacken her considerate and mature letter to the Court. This is grossly unfair, but typical, we believe, of the bias and tenor of the report.

We also object to the gross unfairness in Probation's statement in the "Evaluative Summary" that the marriage between Shelly Kaplan and David Kaplan "appears to have been more of a partnership in selling drugs than anything else". It is bad enough that those two young people were so misguided in their behavior and in trying to resolve the problems of their mutual immaturity and their frustrated attempts to build a life together that they fed their neuroses by involvement in the drug conspiracy. It is worse

Hon. Mark A. Costantino

-6-

September 14, 1977

that Probation exhibits no understanding of the situation and callously comments upon it so as to condemn them as two villains whose relationship had no worth. It is typical again of the entire tone and approach of the Probation report. The report is written as if to justify Shelly's sentence of three to five years and to support a more severe sentence for David Kaplan.

When counsel went to Probation with David Kaplan, we were initially assigned the Probation Officer in Shelly Kaplan's case. We objected to such assignment and asked for a fresh evaluation without contamination by the previous report and by attitudes formed during the previous analysis and evaluation of Shelly Kaplan. We were assigned a new Probation Officer, but apparently have not been able to avoid the prejudice injected by Shelly Kaplan's previous involvement with Probation and by the sentence imposed by Judge Bramwell in her case, which presumably followed recommendations or implications in the Probation Department's prior report.

We would not be taking this strong position before this Court if we had not made such a sound and complete record as to David Kaplan's rehabilitation. We object to the fact that Probation spent so little time with David Kaplan and reached the far reaching condemnatory conclusions that it did in its report. We also specifically object to the fact that Probation did not choose to visit David Kaplan at his job; to speak to his employers and co-workers; to visit him at the Yoga Center; or to speak to any of the personnel at that Center -- though I made a specific written request to Probation as to each of these matters. Copy of that letter of August 9, 1977 is attached. Probation's attitude should have been modified by the flow of responsible character letters submitted by numerous persons who are respected members of society and who have dealt with David Kaplan in his new life through Diet Expo and the Yoga Center. For Probation to turn its back and to attempt to turn the Court's back on these realities is to effectively renege on Probation's obligation to provide a fair and balanced report.

This letter is written with great concern for the Court's reaction. We have hesitated about making this direct attack on the Probation report because we are well aware that in drawing this line we possibly expose our client to the normal counter-reactions of those who are criticized and of those who work regularly with the criticized parties. It was primarily to avoid such a confrontation that we requested Probation to visit Mr. Kaplan at his job and at the Yoga Center and to reevaluate the report. We recognize

Hon. Mark A. Costantino

-7-

September 14, 1977

that Probation is overworked and understaffed. We still believe that in this case such visits were essential and should have been conducted. Since Probation has chosen not to respond to our suggestion, we think it necessary to submit this letter.

In regard to the matters in which we have questioned the accuracy and adequacy of Probation's report, we request a hearing before this Court.

Respectfully yours,



Myron Beldock

MB/bb

Enc.

cc: Frederick P. Schramm
Probation Office
(By Hand)

[REDACTED] Regional Director
Mexico City Regional Office

August 7, 1972

47a

[REDACTED] Special Agent
Monterrey District Office

Defendant Jan J. MARCUS - case [REDACTED]

The following memorandum details my involvement with defendant [REDACTED] in Torreon, Coahuila on July 6, 1972.

On July 6, 1972 in accordance with instructions received from Acting Regional Director [REDACTED] I proceeded to Torreon, Coahuila to meet with [REDACTED] and effect the arrest of subjects involved in the transshipment of a quantity of marijuana.

[REDACTED]

[REDACTED]

[REDACTED]

had effected the seizure of the marijuana bound for Torreon. At this point the MFJP agents and I commenced a search of the hotels, transportation depots, etc. in Torreon in search for defendant ANGELSON. At about 8:30 PM we arrested this subject and processed him at the Palacio del Gobierno.

[REDACTED]

48a

[redacted] advised me that LARCUS and ANGELSON would be transported to San Luis Potosi early the next morning via automobile.

[redacted]

Upon arrival in Monterrey at about 3:30 - 4:00 PM I advised Protection Officer [redacted] of the arrests effected and that the subjects were presently enroute to San Luis Potosi.

[redacted]

Monterrey District Office

REPORT OF INVESTIGATION

PAGE 1 OF 1

TITLE [REDACTED] 7/13/72 GELSON, Jerrold L. et al <i>CFT Smuggling</i> 7/11/72		IDENTIFIER [REDACTED]	
PROGRAM CODE			
ACTIVE ☒ CLOSED ☐ REQUESTED ACTION COMPLETED ☐	OTHER OFFICERS 16253		CROSS FILE ☐ ☐ ☐ ☐ ☐ RELATED FILES <i>File</i> <i>Adm</i> <i>Adm</i>
Monterrey, Mexico August 14, 1973			
CLOSING RE. Closing of case [REDACTED]			

1. Reference is made to the BND-6 by S/A [REDACTED] dated January 19, 1973 regarding the status of [REDACTED]
2. On February 7, 1973, the American Consulate General Monterrey, Mexico was officially informed that Jerrold L. ANGELSON, aka David Barry Kaplan, was released from custody by the officers in San Luis Potosi, Mexico on December 22, 1972. He was granted "provisional liberty" upon the posting of a bond and was free to leave Mexico.
3. Based on the above, and the fact that there is no current investigation on this case, [REDACTED] is being closed by the MDO.

CFT Smuggling
8/11/72

SIGNATURE (Agent)

DATE

8/11/72

OFFICIAL USE ONLY
Bureau of Narcotics and Dangerous Drugs
Department of Justice

HEADQUARTERS COPY 1

This report is the property of the Bureau of Narcotics and Dangerous Drugs.
Neither it nor its contents may be disseminated outside the agency to which loaned.

August 9, 1977

BY HAND

Mr. Frederik P. Schramm
Probation Department
United States District Court
Eastern District New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. David Kaplan
76 CR 259

Dear Mr. Schramm:

After reviewing Probation's pre-sentence report to Judge Costantino, we strongly urge and request that you spend some additional time in examining David Kaplan's current activities and life style, so that the court may be directly advised by probation of its observations and conclusions in those respects. We have, of course, not seen the recommendation portion of the probation report. The evaluation section make it evident that your office has determined that Mr. Kaplan's present rehabilitation and involvement in job and yoga philosophy are superficial and insincere; that the man cannot escape from his improper past behavior without imprisonment; and that (by implication) he would not benefit from young adult offender treatment or probation. We believe that your direct experience with David Kaplan on at least one visit (and hopefully more) to observe him in his daily round will temper and perhaps change substantially this evaluation and conclusion. We understand that Mr. Kaplan had asked that you visit him on the job and at the yoga center. If your decision not to do so was based on time pressures, that problem is eliminated with the adjournment to September 16th.

I understand that this Thursday David will be giving a lecture and demonstration on behalf of Diet Expo for some kind of drug rehabilitation program. I expect to have the

details later today. I suggest that Thursday would be one excellent occasion to observe David in action and to determine whether he is knowledgeable and dedicated in his work. We also suggest that you spend a reasonable portion of a normal day with David, which generally starts early with yoga and attendance at the Center, moves through with varied activities at his job and then continues back at the Center in the evening.

We submit that any meaningful evaluation of Mr. Kaplan for sentence purposes require such visits and observations as a matter of fundamental fairness. The rest of it is up to you.

Your earliest attention to this first request will be greatly appreciated. Since I will be leaving on vacation on Wednesday of this week I would ask you to either call me today or tomorrow before noon. You may also make arrangements directly with Elliot Sagor, Esq., who is in frequent touch with Mr. Kaplan.

Very truly yours,

Myron Beldock

MB:rg

bcc: David Kaplan

SENTENCING MINUTES

52a

(Dated September 23, 1977)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,

-against-

DAVID BARRY KAPLAN a/k/a "RAMA
CHANDRA"; RAYMOND MAC DONALD,
PHILIP MATARESE, JERROLD L.
ANGELSON.

76-CR-259-1

Defendants. :

-----X

United States Courthouse
Brooklyn, New York

September 23, 1977
10:00 o'clock A.M.

B e f o r e :

HONORABLE MARK A. COSTANTINO, U.S.D.J.

HENRI LEGENDRE
ACTING OFFICIAL COURT REPORTER

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
For the Eastern District of New York

BY: CAROL AMON, ESQ.
Assistant U.S. Attorney

MYRON, BELDOCK & ELLIOT SAGOR, ESQS.
Attorneys for the Defendants.

1 THE CLERK: Criminal cause for sentence, United
2 States of America versus David Barry Kaplan.

3 MR. BELDOCK: Good morning, your Honor.

4 THE COURT: Good morning. First of all, is
5 there any just cause why the defendant should not be
6 sentenced?

7 MR. BELDOCK: There is no just cause in the
8 ordinary sense. We did make a request for a hearing
9 in connection with objections to the probation report.
10

11 THE COURT: That's the next part of it.

12 Any statements or objections either to the
13 probation report or anything that may be mitigated in
14 benefiting the defendant that you might wish to state
15 at this time, either one, objections or mitigations.

16 I have received from you a statement of objec-
17 tion to the probation report that you feel that the
18 probation report merely takes the dark side of the
19 defendant's background and lists nothing as to any of
20 the benefits -- or the light side, so to speak, of the
21 defendant's background since he has been arrested
22 and charged with this crime.

23 MR. BELDOCK: May I speak to that, your Honor?

24 THE COURT: You may.

25 MR. BELDOCK: We have put before you in my
letter of September 14 various general and specific

1 objections to the probation report. Your Honor's
2 characterization of it was fair, but I think a few
3 more comments are appropriate.

4 I also remind your Honor that aside from my
5 letter of September 14th there was Mr. Kaplan's letter
6 of August 11th submitted to you along with my letter
7 of August 16th, which was directed in many portions to
8 trying to rectify certain objections raised there to
9 the probation report.

10 I note for your Honor that the probation department
11 had my initial letter of July 21st and various support-
12 ing letters and exhibits, character letters and exhibits
13 concerning Mr. Kaplan's endeavors at Diet Expo and the
14 Yoga Center. Yet when I examined the probation report
15 as did Mr. Kaplan I was struck by the fact that it
16 never dealt with those submissions which were favorable
17 to Mr. Kaplan, if anything, it denigrated by innuendo
18 some of the things that we had raised, and really
19 treated the dark side in the worst sense. It not only
20 treated the dark side but undercut quite unfairly the
21 positive side of Mr. Kaplan's life.

22 The last thing that I wanted to do as counsel
23 for the defendant, who needs the support of Probation
24 in giving an intelligent presentation to your Honor, was
25 to get into a confrontation with Probation. I knew, of

1 course, the Court relies most heavily upon the proba-
2 tion report and therefore --

3 THE COURT: I wouldn't say most heavily; to
4 some extent in order to get some information as to the
5 background of the defendant prior to his involvement,
6 during his involvement and since his involvement. I
7 myself did not investigate the defendant to find out
8 about him. Now, I ask you to tell me what you know
9 about him.

10 MR. BELDOCK: We of course tried to balance that
11 picture. In fairness I also wanted to persuade Probation
12 and therefore I sent my letter of August 9th. I did
13 it to avoid confrontation, and I think to obtain a
14 fairer report. I point out to your HONOR that that
15 letter was not sent with a copy to the Court. I only
16 supplied that along with my objection letter of
17 September 14th because I did not want to put Probation
18 in an embarrassing situation. I thought Probation had
19 not done what they should do by going to Mr. Kaplan's
20 job and not going to see him at Diet Expo, and not
21 talking to his employer or any of his employers or any
22 of the people, and I thought that Probation should do
23 that as part of its duties.

24 THE COURT: What it states in the report is that
25 they found no viable occupation by the defendant during

1 the years of his involvement which he has pleaded
2 guilty to. Did he take issue with that statement?
3 We're not only concerned whether the defendant can do
4 something right after he's caught, because if that
5 were the case I could tell you, Mr. Beldock, about 90
6 per cent of the defendants that come before me probably
7 would never go to jail; so there must be other consider-
8 ations that the Court must make and take and give, and
9 one of them is what was his condition and his sociologi-
10 cal problems, and whether or not he did do anything
11 as far as the community was concerned or whether he was
12 directly involved in criminal involvement, and then
13 demonstrate that he could be good if he wanted to.

14 MR. BELDOCK: I think that's a fair general
15 statement. I think in this case many factors should
16 be put before you.

17 THE COURT: We can agree up to the point of his
18 arrest, whether it be Mexico or whether it be in the
19 United States; up to that point there was nothing
20 viable in his background that anyone would give him a
21 merit badge for, Eagle Scout, or otherwise.

22 MR. BELDOCK: I would not agree as to --

23 THE COURT: I don't ask you to agree, but based
24 on the report and based on the knowledge the Court has
25 developed from the letters you have submitted, the

1 statements made by his family, his sister, his father,
2 his brother; the statement is not unfair.

3 MR. BELDOCK: That there was nothing viable from
4 an employment point of view?

5 THE COURT: Employment or sociological.

6 MR. BELDOCK: You are right. There are some
7 efforts that he made and they were not in the ordinary
8 sense eminently successful or reasonably successful.

9 THE COURT: His confrontation with the law was
10 almost in a way as if he challenged it. He challenged
11 it quite well for a long time.

12 The only thing I'm doing now, Mr. Beldock, is
13 letting you know that I'm extremely familiar with
14 everything that you have submitted on behalf of this
15 defendant including being extremely familiar with the
16 probation report and the entire background of this
17 defendant up to the time of his appearing in Court.
18 When you submitted all those papers as to his new job,
19 what that does as far as the Court is concerned,
20 to exercise discretion of sentence, that's something
21 else.

22 MR. BELDOCK: My thought, your Honor, in attempt-
23 ing to get Probation in that interim of time that we
24 had after August was to get Probation to go to the job
25 and to see David in action at the Yoga Center that I

1 would get my client a more favorable report. And I
2 say this without disagreeing with what your Honor has
3 said, that we have put a lot of balancing statements --

4 THE COURT: Your statement is no different from
5 any lawyer appearing before the Court. If I was an
6 advocate I would be looking for the same thing.

7 MR. BELDOCK: I think to examine a man on his
8 job and in his most important activities is significant.

9 THE COURT: Can we agree on something, that laws
10 are not passed in order for a person to violate them
11 and then after violating the law and being apprehended
12 that the statute itself or the violation itself or the
13 indictment, whatever it may be, is to be cast aside and
14 say now he's now on the path of righteousness and
15 therefore the Court need not take any action and just
16 probate him to the Government and see what happens to
17 him. I don't think the statute was ever passed for
18 that purpose. If you violate it and there is a con-
19 tinuance of that violation something should be done
20 about it; society has to be paid too.

21 MR. BELDOCK: It neither says you must or you
22 need not punish -- and punishment has to do with the
23 person who stands before you on the date of sentence.

24 THE COURT: No question about it.

25 MR. BELDOCK: And a balancing of factors, which

1 I'll address myself to in a few moments.

2 THE COURT: Let me hear it.

3 MR. BELDOCK: I just want to finish these few
4 remarks in the Probation report.

5 I noticed when they spoke in the report of his
6 interest and activities there was some talk about him
7 being involved in Yoga, and then this statement, "It is
8 interesting to note that informed sources --

9 THE COURT: What page?

10 MR. BELDOCK: It's under interest and activities.

11 "It is interesting to note that informed sources
12 have reported that in recent years Yoga has been seized
13 upon by health cultists of which the defendant is one"
14 and then it goes on to say "To recommend Yoga exercises" --

15 I thought that was a backhanded way to deal
16 with a very important aspect -- and to use the word "seized"
17 concerned me; it indicates a superficiality.

18 THE COURT: Could that have been a paraphrasing
19 of defendant's statement to Probation. They asked him
20 "Why are you involved in Yoga" and that's what he told
21 them. They asked him questions and he responded and
22 from that they came out with this.

23 MR. BELDOCK: Well, I think --

24 THE COURT: I don't think it was deliberate.
25 In any event it's not the Yoga that's going to convince

1 the Court. If that were the case I would be wasting
2 my time.

3 MR. BELDOCK: Same section of the report. The
4 only real comment about his job situation says, "He's
5 employed with a nutrition and diet company which pro-
6 motes good health." Since it was so laconic and
7 informative I again pressed Probation. You have our
8 request in the letter for a hearing in regard to any
9 matters that are properly confronted.

10 THE COURT: I think you have taken care of that
11 with a stream of letters that you have submitted to the
12 Court.

13 MR. BELDOCK: I'll stand on the letter because
14 it's in detail and I'll stand on the request.

15 I do think -- just to finish this section of my
16 remarks. I do think that the probation report --

17 THE COURT: I would like to know whether or not
18 you take any specific issue -- since your client has
19 admitted his guilt and he's now going to be sentenced --
20 with the factual statements made as to your client's
21 background involving the hashish, the cocaine, the
22 marijuana, the pilot that went down to Mexico; are
23 any of those statements wrong or improper statements
24 in the probation report?

25 I'm asking you whether or not it's factually

1 incorrect, and if it is, I want you to tell me so
2 because you have an absolute right to attack a factu-
3 ally incorrect statement made in a probation report,
4 and I'll give you that right.

5 MR. BELDOCK: He's not reneging on what he
6 pleaded to before your Honor. The facts stated at the
7 plea I think were more than sufficient or your Honor
8 would not have accepted the plea. He was involved in
9 the conspiracy to import and distribute marijuana, and
10 in some instances hashish was involved. So far as that
11 goes, there is no objection. The minuscule amount of
12 cocaine found on Mr. Kaplan's person, I say you should
13 not give it any --

14 THE COURT: The statute does not talk about
15 proportions. I don't know where anyone gets that idea.
16 There is nothing called a proportionate violation -- a
17 statute is either violated or not violated. The
18 quantity is irrelevant -- unless it's the State of
19 New York Marijuana Law.

20 MR. BELDOCK: That's the conspiracy that
21 Mr. Kaplan is before you on according to indictment
22 dated March '74. The other matters are not part of
23 this conspiracy. Those charged and the specific mat-
24 ters during the conspiracy period that we did object
25 to. And denied in the probation report is a claim based
on some informant-- it's this Mr. Muller who shot Mr. Kaplan

1 and his wife. Shortly before the time that Mr. Muller
2 shot him, that they were big distributors of pills, speed.
3 That was specifically denied and anything else within the con-
4 spiracy.

5 THE COURT: Let's see if I understand you.
6 Let's not take his case but someone other than that.
7 A person is indicted with 20 counts in an indictment,
8 regardless whether it's income tax or otherwise, and
9 he's permitted to plead guilty to one count in that
10 indictment. Are you telling me that the probation
11 report cannot make statements as to the other counts
12 even though the Government is going to dismiss them?

13 MR. BELDOCK: No, Judge, I didn't say that.

14 THE COURT: Because that's a compilation of his
15 background; and that's what we are looking at.

16 MR. BELDOCK: You asked me whether concerning
17 the probation report there was specific objections to
18 certain materials and you focused on the drug informa-
19 tion, and I said to your Honor that during the period
20 of the conspiracy there was one specific claim made to
21 Probation through an informant that in addition to
22 marijuana or hashish that Mr. and Mrs. Kaplan in late
23 1973 were major distributors of pills, that is speed as
24 it is commonly known; that specifically denied in any
25 form.

1 THE COURT: The Court accepts it.

2 MR. BELDOCK: And it is typical of the kind of
3 pile-on information that came from informants to Kaplan's
4 doorstep.

5 If your Honor pleases, another question as to
6 whether the record is complete before your Honor deals
7 with the report of pre-trial services. We did refer
8 to that report in one of my communications with the Court
9 and asked the Court to examine the ongoing evaluation
10 from pre-trial services. Again I was particularly
11 concerned to have your Honor examine such material and
12 get the benefit of Mr. Campbell's report, because he
13 saw or spoke to Mr. Kaplan almost weekly for quite a
14 period of time and was able to evaluate the changes,
15 or at least have an opportunity to see how the man
16 developed while the Probation Officer saw Mr. Kaplan
17 for a limited period of time at his office, and for a
18 much less period of time at a home visit so therefore
19 I did make that request. I trust that your Honor has
20 the opportunity to consult with Mr. Campbell to review
21 the materials and I would ask that your Honor do so if
22 you have not. He's available. I don't know what the
23 situation is but we can obtain him if necessary.

24 THE COURT: I don't think it's necessary. You
25 could take exception to that.

1 MR. BELDOCK: I see from my notes there is one
2 thing that I did not completely cover in the letter
3 before your Honor. We did claim it was an inadequate
4 investigation insofar as time goes. It was brought to
5 my attention after sending that letter that it was also in-
6 adequate as to the questioning of the parents. I happened
7 to have been present when the parents were questioned.
8 It was the same day that we took the plea before your
9 Honor and they were about to go back later that after-
10 noon to Florida; including my preliminary remarks I
11 wouldn't say it took more than half an hour to three
12 quarters of an hour. Some questioning of the family took
13 place, and then it was cut short although the family
14 wanted to give more information because the officer
15 said they would be visited in Florida and they would be
16 spoken to down there by a probation officer.

17 Mrs. Kaplan is here to confirm what I said. In
18 fact, they got a call in Florida. They got a call from
19 a probation officer. Mrs. Kaplan said, "Please come
20 visit us and see what kind of people we are" and the
21 probation officer down there was uninformed that he
22 was supposed to conduct a serious investigation. "I
23 know your address, you live in a good neighborhood and
24 it's not necessary." That bothers me, Judge -- is once
25 again the way the Probation dealt with the parents. I

1 won't go into it. But just to point out to your Honor
2 the probation report section about the parents was
3 essentially -- how can I put it without being too
4 critical -- very meager. Both of these people have
5 solid backgrounds. Nothing of that kind comes into the
6 Probation. Rather there are comments the father offered
7 very little insight, that they were very emotional.

8 THE COURT: I would assume that that statement
9 means that the father if he really knew the first day
10 that this young man was going to get involved in an
11 importation of drugs from Mexico he probably would
12 have cracked his head with a baseball bat. That's
13 what they are talking about. Just to get down to the
14 way I like to talk. He never would have gotten to
15 Mexico. Both legs would have been broken. That might
16 have been good for him.

17 MR. BELDOCK: My last comment about that --
18 what really bothered me --

19 THE COURT: One thing, don't blame the parents
20 under any circumstances for what young men do wrong.
21 They are not there holding their hand and directing
22 them in the course of the crime. The only thing they
23 try to do is direct them in the course of making a
24 good living and being with society. That's what
25 parents do and everything else is just a coverup in

1 order to hide behind them and blame them for something
2 that they had nothing to do with. I want that to go
3 on the record.

4 I'm not against the sociological kind of report
5 but I don't think that every mother and father wants
6 their son to be bad.

7 MR. BELDOCK: I think our position before the
8 Court is exactly the same.

9 THE COURT: They had no insight because they
10 didn't know, and if they did they are the last ones to
11 say anything bad against their son, otherwise they
12 wouldn't be maternal and paternal.

13 MR. BELDOCK: You really make my point. That is
14 why I was upset by the probation report. Three times
15 making a point of the fact the parents were unindicted
16 co-conspirators.

17 THE COURT: Used their house.

18 MR. BELDOCK: I know there was a claim.

19 THE COURT: He used their house. That's another
20 time they would have had a baseball bat over his head.
21 That's in honor of your parents.

22 MR. BELDOCK: Not with the parents involvement.

23 THE COURT: I didn't say the parents were
24 involved. I'm saying that he used their home. He put
25 them into a predicament. He wasn't giving it a thought.

1 It was his mother and father. When he ran off at 16
2 years old he wasn't concerned about them being his
3 mother and father.

4 MR. BELDOCK: At this point I'll rely on the
5 papers before your Honor.

6 I have some comments to make, a plea to your
7 Honor.

8 THE COURT: Make them.

9 MR. BELDOCK: I would ask your Honor to permit
10 Mrs. Kaplan to speak for a few moments.

11 THE COURT: Generally I don't permit that. This
12 is not an adversary proceeding. This is merely a
13 proceeding to determine whether there are any mitigating
14 circumstances for the crime in which he pled guilty;
15 if there aren't, the Court must do one thing. If they
16 are then the Court must take that into consideration.
17 He can bring up the entire family. It's not going to
18 change the situation. What you say about him, which I
19 think you are capable of doing and what he says about
20 himself; anything else is cluttering the record, so to
21 speak.

22 I know they are going to say something good
23 about him. The mother will come up and tell me how
24 good the boy is and how good he was when he lived with
25 them.

1 MR. BELDOCK: I have some idea of what Mrs.
2 Kaplan would say and I think it is --

3 THE COURT: Bring her up.

4 MR. BELDOCK: It's supportive and involves
5 mitigating materials.

6 THE COURT: Bring her up.

7 MRS. KAPLAN: My name is Fay Kaplan and this is
8 Irving Kaplan. Irving is 66 years old and three years
9 ago he retired to Florida; 47 years ago Irving was in
10 the food line and made a good living; and for 20 years
11 I worked in the jewelry line and handled millions and
12 millions of dollars and I have a very fine reputation
13 and I'm employed in Florida.

14 THE COURT: It is not your reputation that is at
15 stake.

16 MRS. KAPLAN: We have been named as non-indicted
17 co-conspirators.

18 THE COURT: It is not your dignity at this point.
19 Whatever your accomplishments in life have been they
20 have been a lot better than your son's. Okay.

21 MRS. KAPLAN: I want you to know that David came
22 from a good home and good parents and he was also a
23 quite well mannered respectable young man. How he got
24 involved and the fact that he's committed --

25 THE COURT: Don't ask me to answer that one.

1 MRS. KAPLAN: I can't answer it myself.

2 THE COURT: I've had 21 years on the bench and
3 I've seen every type criminal person that you could
4 possibly see in a lifetime; sometimes as many as 60
5 and 70 a day, so there is nothing that has passed by
6 this Court, and I don't want to answer the question
7 for you.

8 MRS. KAPLAN: I don't want you to.

9 THE COURT: Just believe in my experience.

10 MRS. KAPLAN: But he was never a really violent
11 or really a bad young man. The fact that you have
12 received so many letters from people that commend him;
13 that people are here to stand up with him; that his
14 attorneys have really done a marvelous job for him way
15 beyond what any fee could call for. They know he
16 suffered already quite a bit, and you know from the
17 records, and your Honor I don't have to tell you what
18 Mexico is like. He was in jail for six months. If
19 you read articles -- I was there. I saw the results
20 of the torture. I had to send money to Mexico so
21 someone could bring food into David to eat. The
22 conditions in the prison were horrible and we were
23 fortunate that we were able to get him out in six
24 months.

25 THE COURT: Not as horrible as in some places

1 where they cut your fingers off. I just read last week
2 they look 16 heads off for doing nothing. It's all
3 relative, Mrs. Kaplan. You are fortunate you live in
4 America. But they can't accept what's in America,
5 they decide; no one decides it for them. They happen
6 to live in the best country in the world. I'm telling
7 you something that nobody else recognizes at home and
8 only when they suffer at the hands of a foreign nation
9 then they know how great it is to be here.

10 He should have talked to my mother and father
11 then he would appreciate how great it is to be here.

12 MRS. KAPLAN: A year after David was freed from
13 Mexico he was shot by Gene Muller, he was almost killed.
14 The doctor said it was a miracle that he lived. For
15 five days we didn't know whether he was going to live
16 or die. For six weeks he was in the hospital. This is
17 terrible.

18 THE COURT: It doesn't weigh towards anything.

19 MRS. KAPLAN: I want you to know that he suffered
20 and we suffered greatly too; and for almost killing
21 him Gene Muller served a year and a half in prison.
22 Your Honor, I love this country and I respect its laws
23 and I respect its justice and its mercy and I hope my
24 son will get some mercy.

25 THE COURT: What do you want to say, Mr. Kaplan?

72a

1 MR. KAPLAN: Mrs. Kaplan spoke for me.

2 THE COURT: The defendant has a right to speak
3 to the Court.

4 MR. BELDOCK: I was going to ask if Mr. Kaplan
5 could speak for a moment and then I have closing
6 remarks.

7 THE COURT: Don't sidetrack that one. I don't
8 want to get involved in one of these technical things.
9 I'm speaking directly to you, Mr. Kaplan. Do you hear
10 me speaking to you?

11 DEFENDANT KAPLAN: Yes, I do.

12 THE COURT: You have a right to speak to the
13 Court. I will not get involved and sidetracked any
14 further. Do you want him to continue to speak? He
15 knows he has a right to allocution.

16 MR. BELDOCK: I want him to speak. May I speak
17 after him?

18 THE COURT: You could speak now as long as he
19 knows I've addressed him, he has a right to speak to
20 the Court. There is a reason for my saying these
21 things.

22 MR. BELDOCK: May he speak first and then may I
23 conclude?

24 THE COURT: Yes.

25 DEFENDANT KAPLAN: I've written some words I'd

1 like to say to the Court. I want to thank the Court
2 for this opportunity, I want to thank my family and
3 friends for their support and for believing I'm a
4 changed person.

5 I want the Court to know me. I'm deeply sorry
6 for my past. I'm deeply sorry for the pain and suffer-
7 ing I've caused my family. I'm making amends. I'm
8 making amends of my present activities in the diet
9 nutrition field and teaching Yoga.

10 I've experienced many difficult situations in
11 my life and I've filed into a system that supports and
12 guides me in my new life. I feel, your Honor, I have
13 the energy and the dedication to awaken people to the
14 healthier aspects of life.

15 I hope it is apparent to your Honor by reading
16 my character letters that there is unity and harmony
17 and constructive participation around me in my personal
18 business relationships with the young people that I
19 work with at the rehabilitation center. I hope your
20 Honor will consider my present and my future as the
21 real me. I have taken responsibility for my past and
22 that past is over. I feel I'm now fulfilling my
23 potential in life by contributing to society as a
24 useful and a productive citizen.

25 I trust that your Honor will believe in me that

1 I deserve the chance that I'm praying for today.

2 Thank you, your Honor. Thank you all.

3 MR. BELDOCK: Judge Costantino, I think I have
4 as any advocate would do coming for a sentence tried to
5 put myself in your Honor's shoes and I know that you
6 go through a weighing process of various factors. That
7 goes both ways, and in doing so your Honor I found
8 that -- and I say this as advocate and I say it properly
9 as an Officer of the Court. I know the substance and
10 I found that when you balance the factors there are
11 many many factors heavily favoring not incarcerating
12 Mr. Kaplan. His age, not only that he's 25 now but
13 the conspiracy was one that started when he was very
14 young and terminated at least three years ago. He is --

15 THE COURT: There is something about him that
16 continued from '74 to '76. Do you take issue with that?

17 MR. BELDOCK: I don't think you should be
18 sentencing Mr. Kaplan for anything other than --

19 THE COURT: I made sure that you understood
20 when I gave the example of the 20 counts and he pled
21 to one, I'm not sentencing because of the other things
22 but you can't close your eyes. Justice is not blind.
23 There are statements in the probation report that he
24 was involved in some continuing activity but we do
25 not place emphasis on extrinsic alleged crimes.

1 I'm only accepting it as far as background is concerned
2 and not sentencing him on the basis of those activities.
3

4 MR. BELDOCK: I don't want to dwell on the
5 position we took about the probation report in our
6 objection letter.

7 Let me go on, Judge. When we talk about sen-
8 tencing Mr. Kaplan and we are considering these factors,
9 I'm sure your Honor will give -- I trust your Honor
10 will give heavy consideration to the punishment he
11 actually received. Now, as he stands before this
12 Court I believe he is a first offender under American
13 law, and we take issue with the part of the probation
14 report which I think was inaccurate about some 17 year
15 old matter.

16 THE COURT: Wasn't that a forgery of a document?

17 MR. BELDOCK: To my knowledge that was not a
18 matter that ended up with a criminal record, even misdemeanor.

19 THE COURT: We are not talking about criminal
20 records. We are talking about the man's attitude and
21 his involvement, whether it be criminal or not;
22 sociologically, economically and criminal, all three.

23 MR. BELDOCK: My point simply was that the
24 probation report said it was a conviction and --

25 THE COURT: Discharge is a conviction.

MR. BELDOCK: Conditional discharge can take

1 place for a violation.

2 THE COURT: No question about it.

3 MR. BELDOCK: It's not a criminal record.

4 THE COURT: Well, this was not the same as a
5 speeding ticket, you know. It was a little different
6 than a speeding ticket.

7 Mr. Beldock, I know you know practically every-
8 thing to be known about the State law, and I think you
9 know now I know quite a bit about the Federal law. I
10 also know quite a bit about sentencing people, and I
11 also know how to read a probation report conservatively.

12 MR. BELDOCK: In your balancing process I think
13 that you must give heavy consideration to the fact
14 that when the probation report talks of the period in-
15 volving the matter to which we pleaded guilty, post the
16 Mexican sentence, and imprisonment and then goes on to
17 say that he went out to Arizona successfully faced
18 some other charge and after that resumed --

19 THE COURT: He was acquitted; that was a gun
20 charge.

21 MR. BELDOCK: My point, your Honor, is that by
22 any stretch of the imagination the only --

23 THE COURT: I'll accept the acquittal but I
24 don't have to accept all of it.

25 MR. BELDOCK: I think you should accept the

1 record.

2 THE COURT: He was found to be not guilty beyond
3 a reasonable doubt.

4 MR. BELDOCK: The Court dismissed it. The Court
5 found it an inadequate case to have in front of a jury.

6 THE COURT: Inadequate case --

7 MR. BELDOCK: Which is stronger even.

8 THE COURT: We are talking evidence as opposed
9 to the charge.

10 MR. BELDOCK: When you're talking about sentenc-
11 ing David Kaplan there is only about a six month period
12 there for which he hasn't already served his time, and
13 that period would be post Arizona, mid-'73.

14 THE COURT: There is one item that you haven't
15 attacked. As long as you are back on the probation
16 report the item that he was a fugitive for nine months
17 and living in one of the Manhattan hotels.

18 MR. BELDOCK: I haven't attacked it.

19 THE COURT: I haven't heard it stated.

20 MR. BELDOCK: I pointed out that Mr. Kaplan
21 though he had a passport, though he was out of the
22 country even came up to New York City.

23 THE COURT: What I'm really trying to say to
24 you I will not accept the statement that he was merely
25 a little naive kid and knew nothing about life.

1 Unfortunate for him he knew too much about life.

2 MR. BELDOCK: I haven't said he's a little naive
3 kid. I was saying that he was a person who has made
4 a great transformation. I want to try to emphasize
5 when we are talking about this plea and sentence the
6 period of time covered after his Mexican imprisonment,
7 which was punishment enough, then he was shot.

8 THE COURT: For what he did in Mexico.

9 MR. BELDOCK: The Government I pointed out --

10 THE COURT: If that was not so there would be
11 a charge of double jeopardy here.

12 MR. BELDOCK: I've given you papers. From the
13 government's point of view, it would appear that they
14 closed their file after the Mexican imprisonment was
15 over and this conspiracy for all intents and purposes
16 was over January 1974, one year later, and the material
17 before you that's open really is about six months.

18 Let me go on, your Honor, to talk about what I
19 think is most important. Suffering you know about.

20 He wrote a letter to you which I think explains
21 his position quite well.

22 THE COURT: I read about his marital situation,
23 how much in love they were. I read how they became
24 involved and how she became involved and then how she
25 became an addict and there is no reason or any further

1 chance of reconciliation.

2 Is there anything else you want to tell me?
3 When I sit on this bench, I know the case inside out
4 and I know everything I'm supposed to know about it,
5 and still I know I'm not the smartest man in the world.

6 MR. BELDOCK: I believe your Honor is still
7 anguishing about what to do in this case.

8 THE COURT: Just remember one thing: No sen-
9 tence is an easy task for any Judge. When they talk
10 about computerizing sentences, I wish they were right.

11 MR. BELDOCK: I happen to agree with you.

12 THE COURT: Probably the best thing they could
13 do. The anguish on a Judge must go to what he be-
14 lieves to be fair exercise of judgment for even the
15 most hardened criminal, that can never be understood
16 by the lawyer or the layman.

17 MR. BELDOCK: In the process that you have been
18 going through, I think the most important part has to
19 be who David Kaplan is today; and on that, we have
20 given you very solid evidence that this is not only a
21 different man, but a good citizen in the best sense of
22 the word. You know about his job and his prospects;
23 those are important factors. You know that he has
24 adapted the Yoga discipline which is a very great
25 discipline for the spirit and the body; and you know

1 that he participates helping young people in trouble
2 with drugs, which is part of his trying to make amends
3 and give out to others out of his own bitter learning
4 experiences. You know he has tremendous support from
5 his family and friends. The outpouring of letters,
6 the kind of people who all have been touched by David
7 Kaplan, not in writing some perfunctory letter but
8 trying to put factors before you as to their experience.
9 Those are very significant because it shows that David
10 Kaplan has positively affected himself to that extent
11 with other people, and your Honor can count tremendously
12 upon that evidence. I think that's probably the most
13 important evidence.

14 When you put all that in front of you, Judge,
15 then you have to look back and say, "How did he become
16 involved." You had that short discussion with Mrs.
17 Kaplan. I think you must weigh, Judge, the origin of
18 the involvement and the time involved. I have four
19 children and my oldest is 22, he's only three years
20 younger than David Kaplan, and the Court is familiar
21 that the time that David started in the drug problems
22 which brought him here today, he comes from that group.
23 He should not have gone that way but got some of the
24 worst viruses from the epidemic. It was a difficult
25 time for children.

81a

1 THE COURT: I'm not going to say what I would
2 like to say. I'll bite my tongue at this point.

3 MR. BELDOCK: I don't know what your Honor would
4 say.

5 THE COURT: Well, I think you have been around
6 long enough to know what I was going to say, which I
7 am not going to say. I'll bite my tongue. You speak
8 about epidemics.

9 MR. BELDOCK: It was in my mind an epidemic.

10 THE COURT: I don't want to get into the
11 conversation or the discussion.

12 MR. BELDOCK: My point is, Judge, many young
13 people at that time fell into the same kind of problems
14 that David Kaplan fell into and many have since as the
15 decade has come around shed their skin, so to speak.
16 When we speak about rehabilitation of David Kaplan I
17 find that a weak word. I think he's joined many of
18 his generation in literally shedding their skins and
19 dropping their past behind them, and I think we have
20 proved that before your Honor as an advocate and as
21 an Officer of the Court.

22 I contend that there is really no rational basis
23 when you balance all the factors for this young man to
24 be punished any more.

25 THE COURT: I'm going to say there's a big

1 difference being a user and developing of the business,
2 tremendous difference.

3 MR. BELDOCK: Marijuana is what we are talking
4 about.

5 THE COURT: I don't care, marijuana, anything
6 that's illegal, big difference being a user and taking
7 what they called in their day a joint and going out
8 and peddling hundreds of pounds, thousands of pounds.

9 MR. BELDOCK: Of course there is a difference.

10 THE COURT: \$35,000 worth, \$100,000 worth;
11 hire airplanes and pilots, there is a big difference.
12 I can't see the analogy between that and the little
13 fellow I had in the State Supreme Court, 60, 70, 80 a
14 days, trying to find places to put them, nickel and
15 dime people. He's not a nickel and dime young man.
16 You draw me into these things. I want you to know that
17 I know the drug scene, I've been around it as a Judge
18 for years.

19 MR. BELDOCK: Yes, your Honor. All I can say
20 is was said in one of my report letters to your Honor,
21 that he was with very young people; and yes, they were
22 riding on a very high wave but they were out of their
23 element and they were very unsuccessful; and David
24 really got punished those six months and he served
25 one month here and he served the bitter time of almost

1 dying because the very man who makes the case here, who
2 is the principal source of information here is the man
3 who shot him, and that man is an informer and he's a
4 major source of material here.

5 THE COURT: As is often said if we were able to
6 get priests and rabbis to assist us rather than the
7 informants we would like to have them but unfortunately
8 in the criminal system it generally is the informer and
9 generally the worst one. He's the culprit, he starts
10 the whole ball rolling. You must start somewhere and
11 that's where you start, so you speak to sheep who have
12 followed the leader.

13 MR. BELDOCK: There is a point where it becomes
14 absurd and unjust, and I've been trying to tick off
15 some of the factors. It would appear that Mr. Muller
16 bought his way out of jail for shooting David.

17 THE COURT: I'm not trying that case.

18 MR. BELDOCK: But he did so.

19 THE COURT: I'm not passing any judgment.

20 MR. BELDOCK: He made this indictment. The
21 Government knew about these facts long before and I
22 just think that when you think of a balancing of
23 equities, Muller's year and a half sentence, what
24 happened to David here, I ask your Honor to accept,
25 to recognize the fact that Mr. Kaplan has been over

1
2 punished. The real question is, has he learned a
3 lesson? Is there any rational basis for your Honor
4 not to give him today what I pray for, which is no
5 imprisonment and young adult offender treatment.

6 What I've tried to do, what Mr. Kaplan has tried
7 to do is make the case before your Honor solidly and
8 fairly and open that he has learned the lesson and
9 that he's worthy of the chance. To my mind there is
10 no rational basis to do anything other than grant him
11 young adult offender treatment because the Government
12 wants people like Mr. Kaplan to be able successfully
13 to turn their poor past into good futures and that
14 opportunity before your Honor is precious to Mr.
15 Kaplan who as you know is really involved with solid
16 people in a productive world. The opportunity to end
17 up earning his way not only to young adult offender
18 treatment, but having the record wiped out ultimately.
19 He's only 25. For all that's gone down he's still
20 only 25 years old and it's taken all kinds of shocks
21 and terrors to shoot him out of his past, but he's
22 out of his past and I think, your Honor, in your heart
23 as well as in all your intellectual abilities know we
24 are not here to sentence people simply to justify some
25 concept of what should happen because someone was a
drug dealer.

1
2 We are here to sentence somebody as to what he
3 is today and what the Court thinks he may become. It
4 is my plea today to give all of us who are backing
5 David as well as David, a chance to prove that what he
6 has been for the last eight months now is what he will
7 be forever. If we put him in jail what function will
8 it serve? It will be purely punitive. He'll suffer
9 and we'll suffer.

10 THE COURT: I suppose that's part of the purpose
11 of the statute.

12 MR. BELDOCK: It's the most narrow.

13 THE COURT: Statutes are passed with a term of
14 punishment for the reason that otherwise it would have
15 no teeth. It's like biting into a piece of bread.
16 From a punitive sentence the maximum mentioned would be
17 the maximum that all those Judges would give to all
18 those who appeared before us. What we do is take the
19 punitive sentence of the Congress. Congress intends
20 for us to do something about a violation of
21 that statute number one, and then take into considera-
22 tion the background, the probabilities, potential and
23 also the extent and involvement in the crime, and when
24 you take those five very important factors into con-
25 sideration they say you must exercise what they call
good judicial discretion, whether it's good, whether

1 it's bad, that's what they say and that's what I'll
2 accept and I'm ready to pass sentence unless the
3 Government has something to say.

4 MS. AMON: No, your Honor.

5 THE COURT: I have listened attentively to what
6 you have said.

7 MR. BELDOCK: I think I've made my presentation
8 on the record as well as I could. I still feel your
9 Honor that every factor is important. I'll put it this
10 way. If your HONor has any question about the validity
11 of anything that we have been presenting about David's
12 present position and character I would ask you Honor --

13 THE COURT: I have taken what you have said.
14 I'll accept what you have said and I'll weigh it in
15 conjunction with everything else that I know about this
16 defendant and then come to my conclusion which I'm
17 ready to do.

18 MR. BELDOCK: I know you examined many things.
19 I wish your HONor had an opportunity to speak to the
20 pre-trial services people and to have Mr. Campbell give
21 you the benefit of what he observed to balance out the
22 probation report. On that note I have nothing further.
23 I stand ready for sentence.

24 THE COURT: Do you have anything to say, Mr.
25 Kaplan?

1 DEFENDANT KAPLAN: No.

2 THE COURT: The Court's sentence is and the
3 Court has given extensive time not only to the material
4 submitted but also in viewing the probation report;
5 listened to Mr. Beldock allocute in behalf of his
6 defendant; given some very salient points as to the
7 present rehabilitation presumably as far as viable
8 employment is concerned and other matters. This Court,
9 however, must exercise the discretion under the circum-
10 stances. That discretion is that the sentence of the
11 defendant is three years, five years special parole.
12 I intended to give him a fine. I will not give him a
13 fine.

14 MR. BELDOCK: Would your Honor specify that that's
15 an a(a) (2) sentence.

16 THE COURT: He may have an (a) (2) sentence. I
17 don't know what benefit that is. That's one of the
18 phases of the law to me no one can effectuate and they
19 never take cognizance of it but you have it. No one
20 seems to take notice of it. The prisons don't consider
21 it 99 per cent of the time. If you could get them to
22 effectuate it you could be a good advocate. That's
23 the Court's sentence.

24 MR. BELDOCK: There are several other requests
25 that I have.

1 THE COURT: What are they?

2 MR. BELDOCK: Your Honor knows that Mr. Kaplan
3 is a significant part of his company, the company in
4 which he's working; and your Honor knows that they are
5 involved in their biggest and most significant showing,
6 is scheduled for January at Madison Square Garden. The
7 defendnat has --

8 THE COURT: If you are asking me to give him
9 time to stay out until January I cannot do that.

10 MR. BELDOCK: I would ask your Honor for time
11 at least for him to put his affairs in order and also
12 to assist them.

13 THE COURT: He only has \$150 a week job and he
14 has had nothing else. I'm sure someone else can run
15 this operation, he's not the only one.

16 MR. BELDOCK: I ask your Honor for some reason-
17 able period of time for him to assist his company.

18 THE COURT: He should have been preparing himself
19 for any eventuality in this courtroom, whatever it
20 might be, including probation if the Court had seen fit
21 to give it to him. To wait and see what the Court was
22 going to do -- and he had a full opportunity to settle
23 his affairs, whatever they may be -- and then ask the
24 Court after sentence -- this Court will not do so. I
25 don't believe that's proper under the circumstances, and

1 I don't believe it's proper for me to exercise this
2 discretion.

3 MR. BELDOCK: Frequently Courts give people an
4 opportunity to --

5 THE COURT: I have no idea what his affairs are.
6 Nine months a fugitive I must take into consideration,
7 so I cannot permit it.

8 MR. BELDOCK: We have very adequate bail.

9 THE COURT: I understand that.

10 MR. BELDOCK: More than adequate; a period of
11 a week or two.

12 THE COURT: I really deeply regret that. I
13 will not consider it. I will not consider it. That's
14 the Court's sentence.

15 MR. BELDOCK: Judge, we are prepared to file a
16 notice of appeal today.

17 THE COURT: From what?

18 MR. BELDOCK: From the sentence.

19 THE COURT: You can't file a notice of appeal
20 from the sentence.

21 MR. BELDOCK: Some of the issues involving the
22 probation report -- I think significant issues --

23 THE COURT: I've permitted you to state them
24 and I've listened to you and I tell you I will not
25 take them into consideration.

1 You don't have a right to appeal. I advise the
2 client that once he pled guilty there were no other
3 proceedings; nor is there any appeal and he was advised
4 of that.

5 MR. BELDOCK: We asked --

6 THE COURT: Mr. Beldock, you do whatever you
7 wish. You take any proceeding you think is commensurate
8 with the proper legal function as far as you are con-
9 cerned, but as far as I'm concerned, knowing the Federal
10 System I don't know where your right of appeal is
11 unless you want to hang on something, that's your
12 business. Likewise I have no right to prevent it.

13 If the Court of Appeals wants to give you an
14 opportunity to appeal --

15 MR. BELDOCK: I understand what your position
16 is. I want to complete the record.

17 THE COURT: You have.

18 MR. BELDOCK: I'm saying to your Honor we think
19 that there are grounds for appeal.

20 THE COURT: You think so, but I'll not let him
21 out during that time.

22 MR. BELDOCK: But, your Honor, if you permit me
23 to make the formal application you could deny it.

24 THE COURT: You made it.

25 MR. BELDOCK: If you will permit me with the

1 representation that will file a notice of appeal today
2 to make an application to your Honor for bail pending
3 appeal --

4 THE COURT: I will not grant bail under those
5 circumstances.

6 MS. AMON: I might just add for the record it
7 was specifically addressed to counsel in this case
8 whether they had any problems with any factual state-
9 ments in the record and your Honor said he didn't
10 consider it.

11 MR. BELDOCK: In that respect I simply rely on
12 the materials we put before you, my letter of --

13 THE COURT: And I base my sentence on everything
14 that I heard in this Court this morning.

15 MR. BELDOCK: My letter of September 14th.

16 THE COURT: I considered what I thought was
17 salient and factual on my passing judgment on this
18 defendant.

19 That's the Court's decision.

20 MR. BELDOCK: I don't want the record to
21 indicate that we have done anything to agree with
22 Ms. Amon's comments. We relied on the request that we
23 made in our letter of September 14th and the comments
24 made today.

25 THE COURT: All right.

(Whereupon Court stood in recess in this matter

PHOTOCOPY OF CERTIFIED DISPOSITION AS A YOUTHFUL OFFENDER

CRIMINAL COURT OF THE
CITY OF NEW YORKPart 150, County of N.Y.

CERTIFICATE OF DISPOSITION

No 261451

Docket No. Yo 105 1971

THE PEOPLE OF THE STATE OF NEW YORK

vs.

NAME DAVID KAPLAN AGE 18ADDRESS 15-72 BELL BLVDCITY BAISIDE, NY STATE NYOFFENSE YOUTHFUL OFFENDERDATE OF OFFENSE 12-16-70DISPOSITION COND. DISCH. AS AYOUTHFUL OFFENDERDATE OF DISPOSITION 2-9-71CRIMINAL COURT PART 3 COUNTY NYJUDGE LOGUENI hereby certify that this is a true excerpt of the record
on file in this Court.DATE 10-25 1977COURT OFFICIAL (Signature) A. Ten Title CCU

RESOLUTION OF THE BOARD OF JUDGES OF THE EASTERN
DISTRICT OF NEW YORK DATED OCTOBER 12, 1976
(pp. 93a-97a)

RESOLUTION
UNANIMOUSLY ADOPTED
BY THE BOARD OF JUDGES
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
AT THEIR REGULAR MONTHLY MEETING
HELD OCTOBER 12, 1976

RESOLVED that the dissemination of acceptable standards of procedure will tend to promote public understanding and confidence in the sentencing process, and that such standards having been adopted by the Second Circuit Committee on Sentencing Procedures and approved by the Circuit Judicial Council, the Judges of this Court, having made certain modifications to conform with practice in this Court, do approve their dissemination to the members of its Bar and personnel of the Court and recommend them as desirable practice to be considered in the sentencing phase of criminal cases.

To promote disclosure and fairness in the Sentencing process, the Judges of the United States District Court for the Eastern District of New York recommend to the members of its Bar and the personnel of the Court as desirable practice in criminal cases the following standards:

I.. The Role of Counsel

A. Defense Counsel

1. Defense counsel, on his prompt request, shall be entitled to be present when the defendant is interviewed by probation officers regarding a pre-sentence report to the court:
 - a. To assist in answering inquiries of the probation officer;
 - b. To assist in resolving factual issues and questions;
 - c. To assist in evaluating potential disposition under the Narcotic Addict Rehabilitation Act, 18 U.S.C. § 4251 et seq., Youth Corrections Act, 18 U.S.C. § 5005 et seq., or other specialized sentencing procedures;
 - d. To protect the defendant against incrimination regarding other pending indictments and/or investigations; and
 - e. To protect defendant's rights with respect to an appeal of the conviction.
2. Defense counsel, prior to entry of plea or commencement of plea agreement discussions, shall assure himself that the defendant understands the nature and consequence of the plea and sentencing proceedings.

3. Defense counsel shall familiarize himself with the contents of the presentence report, including the evaluative summary, and any special medical or psychiatric reports pertaining to his client at least two days prior to sentence.
4. Defense counsel may, and when directed by the court, must submit sentencing memoranda to the court prior to the sentencing hearing addressed, inter alia, to the following issues:
 - a. The accuracy of the presentence report;
 - b. Any additional facts relevant to sentencing;
 - c. Recommended alternatives to incarceration, including, inter alia, probation, suspended sentence, community treatment, and/or fine.

B. The United States Attorney

The prosecutor shall advise the judge, on the record or in writing, of any cooperation rendered by the defendant to the government; this memorandum may be submitted by the agency to which cooperation was furnished; it shall be revealed to defense counsel unless the prosecutor shows good cause for non-disclosure.

II. The Role of the Probation Officer

- A. In connection with the preparation of the presentence report, the probation officer shall:
 1. Consider any sentence or correctional proposals which defendant or his counsel may suggest;
 2. Consider any specific factual and opinion evidence relating to defendant's physical and mental condition which defendant or his counsel submits.
- B. In regard to presentence hearings and the sentencing hearing itself, the probation officer shall:
 1. Attend such hearings when requested by the judge;

2. Consult with the judge regarding any queries which the latter may have;
3. Make specific sentence recommendations to the judge when requested.

III. The Role of the Judge

The role of the judge is covered by the Federal Rules of Criminal Procedure, the special sentencing panel practice of judges conferring with other judges and probation officers before sentencing, and by relevant cases.

At the time of sentence, in addition to affording defendant the right of allocution, the right to contest statements in the probation report, and the right to supplement information in the probation report, the sentencing judge, in his discretion, may conduct proceedings so as:

1. To be informed of any agreement;
2. To consider questions regarding the presentence report;
3. To define contested factual issues in the pre-sentence report and, in the discretion of the judge, establish an appropriate procedure for resolving contested material factual disputes;
4. To evaluate the significance of the data in the presentence report on the issue of whether it would support a determination to impose either probation or incarceration;
5. To consider the appropriateness of further study of the defendant, including psychiatric evaluation and/or presentence diagnostic commitment to a correctional facility;
6. To review the extent and value of defendant's cooperation with authorities; and
7. To consider any other matters deemed appropriate or necessary by the judge or counsel.

When sentence is imposed, the court may in its discretion:

1. Make specific findings on controverted factual issues which the court intends to consider in imposing sentence.
2. State for the record, in the presence of the defendant, the reasons for the particular sentence imposed;
3. Direct, where appropriate, that a transcript of the sentencing hearing go forward to the Bureau of Prisons and Board of Parole; where findings have been made on contested issues, the court shall direct that the transcript of such findings go forward to the Bureau of Prisons and Board of Parole.

COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- against -

KAVID KAPLAN,

Defendant-Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

ss.:

I, Reuben A. Shearer, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 211 West 144th Street, New York, New York 10030.

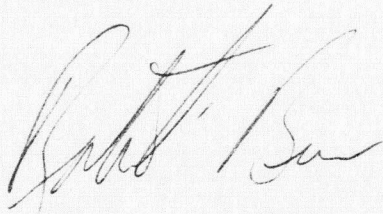
That on the 29th day of Nov. 19 77 at 225 Cadman Plaza
Brooklyn, N.Y.

deponent served the annexed
Appendix

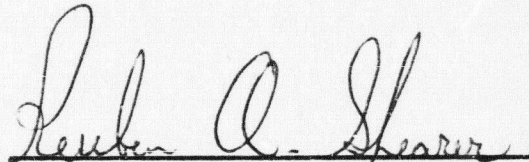
upon
David Trager
U.S. Atty-Eastern Dist.

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,

Sworn to before me, this 29th
day of Nov. 19 77



ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979


Reuben A. Shearer